Supreme Court, U.S.
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IN THE SUPREME
COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CASE NO.:

JAMES T. WILSON and ELAINE WILSON,

Petitioners,

VS.

ALEXANDER'S POWER SHIPPING CO., LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
AND
APPENDIX TO PETITION

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QUESTIONS TO BE PRESENTED FOR REVIEW

1. Inasmuch as the Legislative intent to the 1972 Longshore and Harbor Workers' Compensation Act (LHWCA) Amendments was to provide stevedores, like Petitioner Wilson, with a §905(b) action for injuries sustained by falls on undetectable oil created by the vessel owner prior to turnover and where this Court has confirmed the legislative intent in Scindia Steam Navigation Co. Ltd. v. DeLos Santos, 451 U.S. 156 (1981) and in Howlett V. Birkdale Shipping Co., 512 U.S. _____, 114 S.Ct. 2057, 129 L.Ed 2d 78 (6/13/94) did the Eleventh Circuit's decision, by removing both of the two independent Scindia turnover duties from the jury, conflict with this Court and with other circuits.

2. By holding that Respondent vessel owner had no responsibility under either independent Scindia turnover duty, for its creation of undetectable oil prior to turnover, whether the Eleventh circuit has effectively created an impermissible assumption of the risk doctrine in §905(b) LHWCA cases.

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WITH THE THIRD, FIFTH
AND NINTH CIRCUITS. THESE
DECISIONS, WHICH PRESERVE
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IN THE 1972 LHWCA AMEND-
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TRIER OF FACT, NOT A
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IN THE SUPREME
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CASE NO.:

JAMES T. WILSON and ELAINE WILSON,

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VS.

ALEXANDER'S POWER SHIPPING CO., LTD.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, James Wilson, respectfully prays that a Writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Eleventh Circuit entered

September 20, 1994, affirming the granting of Summary Judgment in favor of Respondent in the within proceeding, and the Order of the United States Court of Appeals for the Eleventh Circuit entered November 29, 1994, denying Petitioner's Petition for Rehearing or a Suggestion of En Banc Consideration, and in support thereof represents as follows:

OPINIONS

The Judgment of the United States Court of Appeals for the Eleventh Circuit affirming the decision of the United States District Court for the Southern District of Georgia is not officially reported and is reproduced in the Appendix hereto at Page 14a.

The Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's Petition for Rehearing or a Suggestion of En Banc Consideration is not officially reported and is reproduced in the Appendix hereto at page 16a.

The Opinion of the United States District Court for the Southern District of Georgia granting Summary Judgment against Petitioner is not officially reported and is reproduced in the Appendix hereto at Page 6a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 20, 1994. the Order of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's Petition for Rehearing or

a Suggestion of En Banc Consideration was entered November 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

BASIS FOR FEDERAL JURISDICTION

The District Court for the Southern District of Georgia, Savannah Division, had jurisdiction of this case pursuant to 28 U.S.C. §1332.

STATUTES INVOLVED

Section 5(b) of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §901, et seq.

> (b) In the event of injury to a person covered under this Chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of Section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if

> the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided by this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Chapter.

LEGISLATIVE HISTORY

The legislative history of the 1972 amendments to the Longshore and Harbor Workers' Compensation Act appears in House Report No. 72-1441, and is reprinted in 1972 U.S. Code Cong. & Adm. News, Vol 3, beginning at page 4698.

STATEMENT OF THE CASE

Petitioner, James Wilson, a Savannah stevedore foreman, was injured when he slipped on undetectable, transparent oil during a pre-turnover inspection of the M/V ALEXANDER'S POWER. Petitioner Wilson's employer, Allsouth Stevedoring Co. was scheduled to commence loading at 0800, April 17, 1991. The oil, which originated from the vessel's cranehouse, was not visible. The oil was located on the dew covered weatherdeck beneath a bundle of previously stowed lumber (33a, 39a)[1]. Without question, the oil had originated from the vessel's crane house, an instrumentality under the exclusive control of the Respondent ship owner (39a).

Inasmuch as the incident occurred before any of Allsouth's longshoremen boarded the vessel to commence work, it occurred prior to the time that the vessel owner turned the work area over to Allsouth. Thus, this case involved the two independent turnover duties enumerated in Scindia Steam Navigation Co. Ltd. v. DeLos Santos, 451 U.S. 156 (1981) and more recently discussed in Howlett v. Birkdale Shipping Co., 512 U.S. _____; 114 S.Ct. 2057, L.ed 2d (6/13/94).

Accompanied by one other Allsouth stevedore, Sam Hughes, and Allsouth's Safety Director, Donald Klages, Mr. Wilson, at approximately 0745, boarded the M/V ALEXANDER'S POWER to conduct a pre-turnover inspection of the vessel's holds and other spaces. At the time

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[1] Petitioner has reproduced excerpts from the record which was before the Eleventh Circuit and has included such excerpts in the Appendix.

of the incident, Petitioner Wilson was proceeding forward along the starboard weatherdeck. Because of the manner in which the vessel had previously stowed bundles of lumber on the starboard weatherdeck, Petitioner Wilson and his fellow workers were required to climb up and down from the bundles of lumber (which were approximately 4' high). The bundles stretched from the bulwarks (ship rail) to the hatches. Thus, there was no continuous access along the weatherdeck (41a, 47a). Photographs taken after the incident demonstrated the method of stow on the weatherdeck (57a, 58a).

To gain access to the #2 hold which he was to inspect, Petitioner Wilson had to climb onto a bundle of lumber. After walking forward on the bundle, he was required to climb down almost three feet to a pipeguard and then down to the deck (approximately 1'). At that time, before inspecting the hold, he intended to walk across the weatherdeck to the bulwark (Ship's rail). He was to discuss a point with an ILA member on the pier (47a). As he stepped down to the deck, he slipped on transparent oil which, as all eyewitnesses testified, was not visible, either before or after the incident(Wilson 48a)(Hughes 51a)(Klages, 42a). As a result of the fall Mr. Wilson sustained a herniated disc (L4-L5). He has been unable to return to work.

After Mr. Wilson fell, Allsouth's safety director, Donald Klages, inspected the area but still could not determine visually that there was any oil (Klages 43a). He then rubbed his hand on the spot and determined that it was slippery. Subsequently, one of the vessel's crew members and he traced the origin of the hidden oil to the vessel's adjacent crane house (adjacent to hold #2). This compartment housed hydraulic lines (43a). Previously, the vessel's crew had opened the hatch covers which operate hydraulically. During

that time, crew members were present on deck (46a).

In his complaint, Petitioner Wilson alleged that Respondent vessel owner breached both of the two Scindia independent turnover duties. Petitioner's allegations were as follows:

a. At the time in which Plaintiff and his co-workers boarded the M/V ALEXANDER'S POWER, oil was present on the deck of the vessel. Therefore, Defendant was negligent in failing to turn over the vessel to Plaintiff is a reasonably safe condition.

b. Defendant was negligent in failing to maintain its crane in a proper working condition and, thus, was negligent in permitting oil to leak out onto the deck.

c. Defendant was negligent in failing to warn Plaintiff of a hidden danger, i.e., existence of clear oil on the deck (1a).

Respondent vessel owner filed a Motion for Summary Judgment. In support thereof, Respondent relied on a Statement of Material Facts to Which There Exists no Genuine Issue to be Tried and Petitioner's Answers and affidavits from witnesses who did not observe the incident. Petitioner, in addition to a responsive pleading, submitted affidavits of Petitioner Wilson, his fellow stevedore, Sam Hughes, Allsouth's Safety Director, Don Klages and Mr. Klages' deposition excerpts.

Based principally on the fact that Petitioner Wilson, like any candid stevedore or longshoreman, admitted that oil was common on vessels and that, like any diligent stevedore,

he was checking for its existence, the trial court granted Respondent shipowner's Motion for Summary Judgment (6a). However, in its opinion, the lower Court referred only to Respondent's Statement of Material Facts as to Which There Exists no Genuine Issue to be Tried. Contrary to a statement in the opinion, Petitioner in response to the Motion, had denied that he expected to find oil during the pre-turnover inspection(33a). Undeniably, he was not warned of this defect which neither of his two co-workers nor he could detect.

Significantly, in its very brief opinion, the trial court addressed only the second independent Scindia duty - duty to warn of hidden dangers. Thus, the lower court did not address the 1st independent Scindia turnover duty - duty to provide a reasonably safe place to work (6a).

On appeal, Petitioner Wilson emphasized that the lower court had addressed only the second duty. In this respect, at oral argument and in letter brief, Petitioner referred the Eleventh Circuit to this Court's opinion in Howlett which had been decided after briefs were submitted. Nonetheless, the Eleventh Circuit, without discussing the fact that the two Scindia turnover duties were independent or without addressing the first Scindia duty, affirmed the lower court in a per curiam opinion.

ARGUMENT

I. THE TRIAL COURT AND THE ELEVENTH CIRCUIT DECISIONS CONFLICT WITH THIS COURT'S §905(b) LHWCA DECISIONS, SCINDIA STEAM NAVIGATION CO. LTD. V. DELOS SANTOS, 451 U.S. 156 (1981) AND HOWLETT V.

BIRKDALE SHIPPING CO., 512 U.S. at _____, 114 S.Ct. 2057, 129 L.Ed 2d 78 (6/13/94), AS WELL AS WITH THE THIRD, FIFTH AND NINTH CIRCUITS THESE DECISIONS, WHICH PRESERVE THE CONGRESSIONAL INTENT IN THE 1972 LHWCA AMENDMENTS DICTATE THAT A TRIER OF FACT, NOT A COURT, MUST RESOLVE THE QUESTION OF WHETHER, THE VESSEL OWNER BREACHED ITS TWO INDEPENDENT TURNOVER DUTIES BY CREATING AN UNDETECTABLE DEFECT (OIL) PRIOR TO TURNOVER IN THE WORK AREA

The effect of the Eleventh Circuit's decision is to eliminate a stevedore's §905(b) LHWCA remedy for undetectable, hazardous conditions created by a vessel prior to turnover. In this respect, the decision ignores the fact the two turnover duties set forth in **Scindia Steam Navigation Co. Ltd. v. DeLos Santos, 451 U.S. 156 (1981)** are independent.

In **Scindia Steam Navigation Co. Ltd. v. DeLos Santos, 451 U.S. 156 (1981)** this Court, enumerated two independent turnover duties that the vessel owner, in a §905(b) LHWCA case, owed to a stevedore. First, prior to turning the work area over to the stevedoring company for loading or discharge, the vessel owner has an obligation to provide a reasonably safe work place for a competent stevedore, i.e., a weatherdeck free of undetectable defects. The second independent, turnover obligation is that the vessel owner must warn of hidden dangers, e.g., undetectable oil.

As Congress indicated in the Committee Reports to the 1972 LHWCA Amendments, oil is a hazard for which a vessel owner has potential liability. As the Report stated:

> Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take corrective action where it knows or should have known about a dangerous condition.
>
> So, for example, where a longshoreman slips on an oil spill on a vessel's deck and is injured, the proposed amendments to Section 5 would still permit an action against the vessel for negligence. To recover he must establish that: 1) the vessel put the foreign substance on the deck, or knew that it was there, and willfully or negligently railed to remove it; or 2) the foreign substance had been on the deck for such a period of time that it should have been discovered and removed by the vessel in exercise of reasonable care by the vessel under the circumstances. The vessel will not be chargeable with the negligence of the stevedore or employees of the stevedore.

1972 U.S. Code Cong. & Admin. News, at 4704.

In Scindia this Court framed the two independent duties in the following manner:

> That the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances." This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such a condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. Id., at 416, n 18, 22

> L.Ed. 371, 89 S. Ct. 1144. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at lest to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a longshoreman.

Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156, at 167 (1981). Until the Eleventh Circuit, in summary fashion, affirmed the trial court, no Circuit court in a LHWCA §905(b) turnover case, had ever ruled that a vessel owner had no obligation for undetectable dangers that it had created in instrumentalities within its exclusive control, e.g., oil originating from the crane house and leaking on to the weatherdeck. Scindia and Howlett, disregarded by the Eleventh Circuit, indicate that the trier of fact must resolve the questions - whether the vessel owner has breached these two independent duties.

A. THE INDEPENDENT DUTY TO PROVIDE A REASONABLY SAFE PLACE TO WORK APPLIES IRRESPECTIVE OF WHETHER THE DEFECT IS OPEN OR LATENT

Petitioner Wilson alleged that the transparent oil constituted a pre-turnover latent defect. The evidence was undisputed that his colleagues and he could not see the oil on the dew covered deck. Moreover, Petitioner Wilson did not expect to find oil (33a, 36a). In any event, irrespective of whether the defect was hidden or open, the trier of fact, not the court, must resolve the issue of whether Respondent vessel owner breached its first Scindia turnover duty - whether having created a hazard on the weatherdeck, the owner fulfilled its obligation to turn over the work area in a reasonably safe condition. Thus, the Eleventh Circuit's opinion conflicts not only with this Court's decision but with every other Circuit which has considered these issues.

As framed by this Court in Scindia, the owner's duty to turnover its vessel in a reasonably safe condition is not dependent on the existence of a latent defect (as defined in Scindia and Howlett). Rather, only the second obligation, duty to warn, is dependent on the existence of a latent defect.

In Howlett, this Court referred to its previous decision in Federal Marine Terminals, Inc. v. Burnside Shipping Co., 394 U.S. 404 (1969), a pre-1972 LHWCA case. Noting that the vessel had a duty to turn over the vessel in a reasonably safe condition, this Court in Howlett stated that, as a

corollary, the owner must warn of hidden defects. However, this court further stated, as it had in Scindia, that there are two components to the turnover duty. Howlett, 512 U.S. at ____, 114 S.Ct. 2057, 129 L.Ed 2d 78 (1994).

In Howlett, unlike Petitioner Wilson, the plaintiff for some inexplicable reason, had not alleged that the owner had breached the first independent duty. In this respect the Court noted:

> "[a]lthough both components of the turnover duty are related in various respects, Howlett confines his case to an allegation that Birkdale failed to warn that the tween deck was covered with plastic rather than (as is ordinarily the case) than paper and plywood."

512 U.S. at ____; 114 S.Ct. 2057, 129 L.Ed 2d 78 at 87.

In that case, a discharging longshoreman slipped on a sheet of clear plastic in previously stowed cargo. Although this Court observed that one of Plaintiff's witnesses was able to see the plastic, it held that there was an issue of fact on the second independent duty - to warn of latent defects. In any event, Howlett is significant to this case because it has re-emphasized that the two turnover duties are independent.

In every other circuit except now, in the Eleventh Circuit, courts have held that the first turnover duty applies irrespective of whether the defect is open or latent. Thus, where there was sufficient evidence that the owner created a

defect in its structure or in its appurtenances, the trier of fact, not the court, must decide the two Scindia duties. Otherwise, a stevedore would assume the risk of vessel created pre-turnover defects.

In Gay v. Barge, 266, 915 F.2d 1007 (5th Cir. 1990), Plaintiff longshoreman, while boarding the vessel, slipped on a makeshift gangway. The condition, created by the vessel, was obvious. Accordingly, Plaintiff alleged that the owner was negligent in failing to turn over the vessel in a reasonably safe condition. The Fifth Circuit held that there was sufficient evidence to withstand a Motion for Directed Verdict. In Gay, there was evidence that the vessel owner had actual knowledge of the conditions. However, as this Court stated in Scindia, the vessel owner was charged with knowledge of pre-turnover conditions in areas created under its exclusive control. 451 U.S. at 176.

In Treadaway v Societe Anonyme Louis-Dreyfus, 894 F.2d 161 (5th Cir. 1990), Judge Wisdom held that a longshoreman's awareness of an open hazard did not preclude recovery (detectible oil on the main deck on which Plaintiff traversed towards his work area. The Fifth Circuit, based on this court's opinion in Scindia, affirmed the jury's verdict in favor of the Plaintiff.

Most recently, the Ninth Circuit in Thomas v. Newton International Enterprises, 42 F.2d 3 1266 (9th Cir, 1994) re-emphasized the nature of the vessel's duty for open and obvious conditions in the vessel's appurtenances. Plaintiff Thomas, a longshoreman, fell through an unguarded hatch opening while proceeding into hold #6 during cargo operations. As in the instant case. Plaintiff Thomas was preceded by a co-employee. Both workers had looked down

the ladder. Moreover, like Petitioner Wilson, Plaintiff Thomas was not aware of the danger beneath her and, thus, was not aware of any conscious decision that she could possibly make. However, unlike Plaintiff Thomas, Petitioner Wilson could not detect the defect - transparent oil on the dew covered deck. In any event, the court in Thomas considered the conditions to be open and obvious.

Reversing the lower court's order granting summary judgment to the vessel owner, the Ninth Circuit held that failure to eliminate an unreasonably dangerous condition may constitute a failure to turn over the vessel in a condition reasonably safe for an experienced stevedore to work. As the court stated:

> In determining whether a particular hazard is unreasonably dangerous, the fact finder must examine the totality of the factual circumstances surrounding the hazard and the accident and consider them as a whole.

42 F.3d at 1270.

The court further held that, contrary to the vessel's position, avoidability of the hazard, although relevant, was not necessarily determinative.

Although finding for the vessel owner, the Third Circuit in Kirsch v. Prekookeanska Plovidba, 971 F.2d 1026 (3rd Cir. 1992), stated that vessel owners cannot always rely on longshore workers to avoid even the most obvious of

hazards. Moreover, the court in language very appropriate to the instant case, stated as follows:

> Where a longshore worker slips and falls on an oil spill that was not obvious to the worker in the performance of his or her duties is the paradigmatic case where an action lies against the shipowner for negligence. In many cases, the obviousness of a hazard will be a reasonably disputed issue of fact in appropriate for resolution by the district Court on summary judgment.

971 F.2d at 1030, fn. 5.

In the instant case, the undisputed evidence by eyewitnesses was that the oil was not visible, before or after the incident.

If the trial court and Eleventh Circuit had followed the guidelines of this Court and from other Circuits, a fact finder would have decided this issue in this case.

As this Court stressed in Howlett, there is a distinction between the vessel's obligation for a pre-turnover defect created in the vessel's structure or appurtenances from those defects created by previous stevedores in the stow. In Howlett, plaintiff alleged that the previously stowed cargo created a defect. The reason for the distinction is that during the voyage, the vessel exercises exclusive control over its

structures and appurtenances and has the obligation and opportunity to inspect prior to turning the vessel over to the stevedore. In particular, this Court stated in Howlett:

> For the purpose of delineating the scope of a shipowner's turnover duty, then, the cargo stow is separate and distinct from other aspects of the ship. When between ports, the vessel and its crew have direct access to (and control over) the ship itself and its gear, equipment and tools. The vessel's responsibilities to inspect these areas of the ship are commensurate with its access and control, bearing in mind, of course, that negligence, rather than unseaworthiness, is the controlling standard where longshoremen are concerned.

512 U.S. _____, 114 S.Ct. 2057, 129 L.Ed. 2d 78, 91 (1994).

Based on this Court's decisions in Howlett and on the Third, Fifth and Ninth Circuit decisions, the trier of fact, not the Court, must resolve the question - whether Respondent owner breached its obligation to turn the work area over to Petitioner Wilson in a reasonably safe condition. Although Petitioner Wilson alleged that the transparent oil constituted a latent defect, there is a factual issue - even if the defect is to be classified as open.

As evidentiary support that the condition was unsafe for a competent stevedore, Petitioner's fellow stevedore, Sam Hughes, and Allsouth's Safety Director, Don Klages, testified that they could not see the transparent oil located directly beneath a bundle of pre-stowed lumber (even after Petitioner had fallen). Thus, if a competent stevedore, like Petitioner, is diligent in checking for the presence of oil created by the vessel owner but cannot see it, this hazard is one for which the owner has potential liability under §905(b), LHWCA. For this reason alone, Petitioner Wilson respectfully requests that this Court, as it did in Howlett, reverse the decision of the Circuit Court and direct that it be remanded to the trial court.

B. UNDER THIS COURT'S DEFINITION, THE UNDETECTABLE, TRANSPARENT OIL CREATED BY THE RESPONDENT OWNER CONSTITUTED A LATENT DEFECT. THUS, BECAUSE THE OWNER FAILED TO WARN PETITIONER WILSON IT HAS POTENTIAL LIABILITY UNDER THE SECOND INDEPENDENT SCINDIA DUTY.

The record before the trial court and the Eleventh Circuit was that Petitioner Wilson and his two colleagues were unaware and could not detect that transparent, undetectable oil was present on the dew covered weatherdeck during their pre-turnover inspection. Although aware that oil was common on vessels, neither Petitioner Wilson nor his colleagues were aware that oil would be or was present on the weatherdeck. In particular, Donald Klages, the Allsouth Safety Director looked specifically at the spot where Petitioner Wilson has fallen. He could not determine the oil until he rubbed his

fingers on it (42a). Moreover, contrary to the erroneous finding of the trial court, Petitioner did not expect to find it on the weatherdeck. (R1-20)(R1-21). The oil had originated, obviously prior to turnover, from the vessel's crane house. He was not warned by the vessel's crew who were present on deck when Petitioner Wilson's co-workers and he boarded (48a). Moreover, the vessel owner offered no evidence that it had, pursuant to Howlett's direction, inspected the area which was under the vessel's exclusive control.

The duty to warn applies to latent defects. As defined by this court in Howlett:

> The duty attaches only to latent defects, defined as hazards that are not known to the stevedore and that would be neither obvious to nor anticipated by a skilled stevedore in the competent performance of his work.

Howlett, 512 U.S. at _____; 114 S.Ct. 2957, 129 L.Ed. 2d 78 (1994) at 4494.

Breaking down the definition of latent defect, one can make the following analysis applicable to this case:

1. Unknown to the stevedore - Neither his colleagues nor Petitioner Wilson were aware of the oil. They could not see it and the vessel who created it did not warn them.

- and -

2. Neither obvious - No one could see the oil even after the fall. In fact, Allsouth's Safety Director had to rub his hands on the spot to detect the oil.

- and -

3. Nor anticipated - In response to Respondent's Motion for Summary Judgment, Petitioner Wilson denied that he anticipated the presence of oil (33a, 36a). In this respect, the trial court's order was based solely on Respondent's Statement of Material Facts to Which There Exists no Genuine Issue to be Tried, a pleading required by the Local Rule, S.D. Ga. Interestingly, the trial court did not refer to Petitioner's response to the Motion for Summary Judgment, nor the affidavit of Petitioner, Sam Hughes (stevedore), Donald Klages (Safety Director) nor the deposition of Donald Klages.

By holding that the duty to warn does not apply if a stevedore is aware generally that oil (not hidden oil) can exist and if the stevedore is diligent enough to check for its presence (which he could not detect), the trial court misapplied this Court's definition of latent defect.

Specifically, the trial court and the Eleventh Circuit failed to recognize that Howlett drew a distinction between pre-turnover defect created by the vessel in its structures/ appurtenances from those defects originating in the previously stowed cargo. Moreover, the trial court and the Eleventh Circuit failed to recognize that the vessel has control over its

gear, equipment and spaces during the voyage. As this Court stated, "the vessel's responsibilities to inspect these areas of the ship are commensurate with its access and control . . ." Howlett v. Birkdale Shipping, 512 U.S. at __, 114 S.Ct. 2057, 129 L.Ed. 2d 78. Having created the danger which emanated from its crane house containing hydraulic lines, the vessel owner had a duty to inspect for oil prior to turning the M/V ALEXANDER'S POWER over to Petitioner Wilson's employer, Allsouth Stevedoring Co. Commensurate with this duty, Respondent vessel owner had an obligation to warn of latent defects, knowledge of which it was charged. Thus, a fact finder, not the court, should resolve this issue.

II. BY REFUSING TO RECOGNIZE THAT RESPONDENT VESSEL OWNER HAS POTENTIAL LIABILITY FOR CREATING AN UNDETECTABLE DEFECT PRIOR TO TURNOVER IN A COMMONLY USED WORK AREA (WEATHERDECK), THE ELEVENTH CIRCUIT AND THE TRIAL COURT HAVE EFFECTIVELY CREATED AN IMPERMISSIBLE ASSUMPTION OF THE RISK DOCTRINE IN THIS §905(B) LHWCA CASE.

Under admiralty law, the doctrine of assumption of risk is not authorized. Socony Oil co. v. Smith, 395 U.S. 424 (1939). However, by holding effectively that Respondent vessel owner had no obligation under either independent Scindia turnover duty for an undetectable defect that it created prior to turnover, the Eleventh Circuit has, for all intents and purposes, held that Petitioner Wilson assumed the risk of slipping on hidden oil on the weatherdeck. Thus, this opinion is absolutely at odds with

the legislative intent to the 1972 LHWCA amendments and with this Court's decisions in Scindia and Howlett. To reiterate, Congress earmarked oil as a hazard for which a vessel owner could be liable in a §905(b) case.

Justifiably, other circuit courts have ruled in favor of shipowners where the stevedore either created the oil hazard during cargo operations or where the Plaintiff was aware of and could have avoided the hazard., e.g., Kirsch v. Prekookeanska Plovidba, 971 F.2d 1026 (3rd Cir. 1992). However, no other court has immunized the vessel owner from liability where, as in this case, there was evidence that the owner created an undetectable oil hazard prior to turnover. Thus, in order to preserve his rights under §905(b) of the Act, Petitioner Wilson respectfully requests that this Court reverse the opinion of the Eleventh Circuit with direction to remand for resolution of both Scindia duties by the jury.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment below.

Respectfully submitted,

Alan S. Gaynor
BOUHAN, WILLIAMS & LEVY
Post Office Box 2139
Savannah, Georgia 31498-1001
(912) 236-2491

ATTORNEYS FOR PETITIONERS

DATED 24th Day of FEBRUARY, 1995.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

JAMES T. WILSON and ELAINE WILSON,	)	**CV 493-36**
Plaintiffs,	)	
- vs -	)	
ALEXANDER'S POWER SHIPPING CO., LTD	)	
Defendant.	)	

ORDER

Before the Court is the Defendant's motion for summary judgement. For the reasons articulated below, the Court **GRANTS** the Defendant's Motion.

BACKGROUND

On April 17, 1991, the Plaintiff, an experienced stevedore superintendent, boarded the Defendant's vessel with two other stevedores to inspect the vessel prior to the commencement of loading operations. As the Plaintiff was walking along the weather deck of the vessel, he slipped and fell on a patch of oil, causing him to injure his back. The Plaintiff subsequently sued

the vessel owner, contending that the oil was transparent and partially obscured by stowed lumber and morning dew, and, thus, constituted a hidden danger and that the Defendant vessel breached its duty to warn him of such danger. The Defendant, however, maintains that the oil was clearly visible, and, moreover, regardless of its obviousness, was a hazard admittedly anticipated by the Plaintiff as an experienced stevedore, and, therefore, that the vessel had no duty to warn.

DISCUSSION

The "purpose of summary Judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)(quoting Fed. R. Civ. P. 56 advisory committee's note). The Court's analysis ends "where there is no genuine issue of material fact and where the moving party is entitled to judgment as a matter of law." Great Lakes Dredge & Dock co. v. Miller, 957 F.2nd 1575, 1578 (11th Cir. 1992); Real Estate Fin. v. Resolution Trust Corp., 950 F.2d 1540, 1543 (11th Cir. 1992)(both citing Celotex corp. v. Catrett, 477 U.S. 317, 322 (1986)). In assessing whether the movant is entitled to summary judgment in its favor, the district court must review the evidence and all reasonable factual inferences arising from it in the light most favorable to the non-moving party. Welch v. Celotex Corp., 951 F.2d 1235, 1237 (11th Cir. 1992); Ryder Int's Corp. v. First Am. Nat'l Bank, 943 F.2d 1521, 1523.

The Plaintiff has brought this action pursuant to the Longshoremen's and Harbor Workers' Compensation Act ('LHWCA"), 33 U.S.C. §905(b). Under §905(b), a shipowner is liable for an injury to a covered person only where the injury is caused by a ship's negligence. Unseaworthiness, an historic ground for recovery under the Act, and a doctrine which imposed strict liability upon a shipowner for injuries to longshoremen, was abolished as a basis for shipowner liability by the 1972 Amendments to the LHWCA.

In the seminal case of Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981), the U.S. Supreme Court set out the specific duties owed by shipowners to stevedores and longshoremen under the 1972 amendments to the LHWCA. The Supreme Court stated:

> [T]he vessel owes to the stevedore and his longshoremen employees the duty of exercising due care "under the circumstances." This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise

> of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him is reasonably competent in the performance of his work.

Id., 451 U.S. 166-67 (citation omitted)(emphasis added).

Thus, under Scindia, before a stevedore begins work, a shipowner must turnover the ship and its equipment in a condition that permits a stevedore to do its work with treasonable safety, and must warn the stevedore of any hidden dangers or dangers not anticipated or expected by a reasonably competent stevedore. Furthermore, once loading operations begin, the shipowner may ordinarily rely on the stevedore to perform its work with reasonable care, and there is no duty to supervise the stevedore "absent contract provision, positive law, or custom to the contrary." Roach v. M/V AQUA GRACE, 857 F.2d 1575, 1581 (11th Cir. 1988)(quoting Scindia, 451 U.S. at 172.

Under the plain language of the Supreme Court's decision in Scindia, the Defendant breached no duty to warn in this case. It is uncontested that oil and grease are commonly present on a vessel's weatherdeck, and that an experienced and expert stevedore would anticipate their presence. (Def.'s Statement of Material Facts.) Furthermore, the Plaintiff, a stevedore with more than fifteen years of experience, concedes that, as part of his duties,

he routinely checks for the presence of oil during his inspections. (Pl.'s Resp. to Def.'s Mot. for Summ. J. at 3.) Moreover, on the morning of April 17, it is undisputed that, among other tasks, the Plaintiff and his two colleagues were "looking for oil" on the ship's weather deck. (Pl.'s Resp. to Def.'s Mot. for Summ. J. at ¶2.) Given such facts, the vessel owed no duty to warn the Plaintiff of the presence of the oil, when the Plaintiff and his colleagues expected or anticipated oil on the weatherdeck and, indeed, were specifically inspecting for such oil. See, e.g., Lamartina v. Pan Ocean Shipping, 1993 AMC 77, 79 (D. Md. 1993) (shipowner had no duty to warn stevedore of presence of oil and grease when substances were anticipated by a reasonably competent stevedore in the performance of his duties); Meserole v. M/V FINA BELGIQUE, 736 F.2d 147, 150 (5th Cir. 1984) (shipowner had no duty to warn stevedore of oily residue where such residue was expected by stevedore). Additionally, while the Plaintiff contends that the oil was transparent, allegedly because it blended with the morning due, the Court finds that the mere fact that the oil amy have been transparent did not impose a duty upon the shipowner to warn of such oil, in the absence of any allegation by the Plaintiff that dew, or even clear oil, on a ship was unusual or unanticipated by him as an experienced stevedore.

Accordingly, the Court finds that the Defendant did not breach any duty to warn and hereby **GRANTS** the Defendant's Motion for Summary Judgment.

SO ORDERED this 15th day of November, 1993.

/S/

B. AVANT EDENFIELD,
CHIEF JUDGE
UNITED STATES DISTRICT
COURT, SOUTHERN DISTRICT
OF GEORGIA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

****

JAMES T. WILSON and ELAINE WILSON,	)	**CV 493-36**
Plaintiffs,	)	
- vs -	)	
ALEXANDER'S POWER SHIPPING CO., LTD	)	
Defendant.	)	

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JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came before the Court. The issues having been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in accordance with Court's order dated November 15, 1993, and defendants' motion for summary judgment having been granted, Judgement is hereby entered in favor or defendant Alexander's Power Shipping Company, Ltd. This case stands dismissed.

DATED November 18, 1993.

/S/
HENRY R. CRUMLEY, JR.
CLERK

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CASE NO.: 93-9405

D.C. Docket No.: CV 493-36

JAMES T. WILSON and ELAINE WILSON,

Plaintiffs/Appellants,

VS.

ALEXANDER'S POWER SHIPPING CO., LTD.,

Defendant/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

(SEPTEMBER 20, 1994)

Before TJOFLAT, Chief Judge, ANDERSON, Circuit Judge, and PAINE*,
Senior District Judge.

PER CURIAM:

AFFIRMED. See, 11th Cir. R. 36-1

Costs are taxed against Plaintiffs-Appellants.

*Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CASE NO.: 93-9405

D.C. Docket No.: CV 493-36

JAMES T. WILSON and ELAINE WILSON,

Plaintiffs/Appellants,

VS.

ALEXANDER'S POWER SHIPPING CO., LTD.,

Defendant/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION

NOVEMBER 29, 1994

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, ANDERSON, Circuit Judge, and PAINE*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT

/S/
UNITED STATES CIRCUIT JUDGE

*Honorable James C. Paine, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

****

JAMES T. WILSON and ELAINE WILSON,	)	**CV 493-36**
Plaintiffs,	)	
- vs -	)	
ALEXANDER'S POWER SHIPPING CO., LTD	)	
Defendant.	)	

****

O R D E R

The Judgment of this Court in the above entitled action having been AFFIRMED

IT IS HEREBY ORDERED that the Judgment of the Eleventh Circuit, U.S. Court of Appeals, is made the judgment of this court.

This 11th day of December, 1994.

/S/
JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF GEORGIA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

****

JAMES T. WILSON and ELAINE WILSON,

Plaintiffs,

- vs -

ALEXANDER'S POWER SHIPPING CO., LTD

Defendant.

****

COMPLAINT

NOW COME Plaintiffs, James T. Wilson and Elaine Wilson, in the above styled action and filing their Complaint show the Court as follows:

1. Plaintiff James T. Wilson is a resident of Richmond Hill, Georgia and at all times hereinafter mentioned was employed as a stevedore superintendent for Allsouth Stevedoring Company, Savannah, Georgia.

2. Plaintiff Elaine Wilson is a resident of Richmond Hill, Georgia and is the wife of James

T. Wilson.

3. At all times hereinafter mentioned, Defendant Alexander's Power Shipping Co., Ltd. is a legal entity organized and existing under the laws of St. Vincent and Grenadines and was managed by Alexco Shipmanagment Co., Ltd., 14 Skouzest, 18536 Piraeus, Greece and was the owner of the oceangoing vessel M/V ALEXANDER POWER.

4. Jurisdiction exists in this Court pursuant to 28 U.S.C. §1332 inasmuch as there is diversity of citizenship between the parties and the amount in controversy exceeds $50,000 exclusive of interest and cost. This case is brought pursuant to the provisions of 33 U.S.C. §905(b).

5. Venue lies within the Savannah Division of the Southern District of Georgia pursuant to 28 U.S.C. §1391.

6. On April 17, 1991, the M/V ALEXANDER'S POWER called at the port of Savannah, Georgia. Pursuant to a contract with defendant, Allsouth Stevedoring Company was to act as stevedore for the loading of cargo aboard the M/V ALEXANDER'S POWER. In preparation for working the holds of the vessel, Plaintiff, as stevedore superintendent for Allsouth Stevedoring Co. and the safety director of Allsouth Stevedoring Company boarded the vessel.

7. After boarding the vessel, Plaintiff and the safety director preceded towards the number

2 hold to check on its readiness for cargo operations. In stepping off of a pipe guard onto the weatherdeck, Plaintiff slipped on what was later determined to be oil from a ship's crane. Plaintiff fell onto his back and as a result thereof sustained a ruptured lumbar disc (L-5).

8. Subsequent investigation revealed that at the time Plaintiff boarded the vessel, there was an oil leak from a line on the vessel's crane. The clear oil had spilled out onto the weatherdeck which was also covered with dew. Neither Plaintiff nor Allsouth Stevedoring Company's safety director were able to detect the presence of the oil.

9. As a result of the injuries sustained aboard the M/V ALEXANDER'S POWER, Plaintiff was required to undergo surgery for treatment of the ruptured disc. Following surgery, Plaintiff was unable to work for a period of three months. Subsequently, Plaintiff did return to work. However, because of continuing leg and back pain, Plaintiff was not able to work in his full capacity as a stevedoring superintendent.

10. In December, 1992, because of continuing pain and disability, Plaintiff sought additional medical treatment. Subsequently, Plaintiff's orthopedic surgeon advised that Plaintiff discontinue work. Accordingly, since January 15, 1993, Plaintiff has been unable to work as a stevedoring superintendent. Plaintiff was earning approximately $40,000 per year as a stevedore. Additionally, Plaintiff has been unable to operate a

commercial cleaning business from which he had been earning approximately $2,500 a year.

11. To date, Plaintiff has incurred medical expenses of $12,625.95. Plaintiff continues to receive medical treatment. Additionally, he is sustaining a loss of income on an of $769 per week.

12. Plaintiff's injuries were caused solely and proximately by the negligence of Defendant in the following manner:

a. At the time in which Plaintiff and his co-workers boarded the M/V ALEXANDER'S POWER, oil was present on the deck of the vessel. Therefore, Defendant was negligent in failing to turnover the vessel to Plaintiff is a reasonably safe condition.

b. Defendant was negligent in failing to maintain its crane in a proper working condition and, thus, was negligent in permitting oil to leak out onto the deck.

c. Defendant was negligent In failing to warn Plaintiff of a hidden danger, i.e., existence of clear oil on the deck.

13. As a result of injuries suffered to James T. Wilson caused by Defendant's negligence, Elaine Wilson has lost her spouse's society, companionship and consortium.

WHEREFORE, Plaintiff James T. Wilson

requests trial by jury and demands judgment against Defendants in a sum to exceed $800,000 together with interest and costs of prosecuting this action. Plaintiff Elaine Wilson requests trial by jury and demands judgment against Defendants in the amount of $75,000 together with interest and costs of prosecuting this action.

DATED this 3rd day of February, 1993.

BOUHAN, WILLIAMS & LEVY

/S/

Edwin D. Robb, Jr.
Georgia Bar No.: 607900
Attorneys for Plaintiff
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Savannah, Georgia 31498-1001
(912) 236-2491

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

JAMES T. WILSON and ELAINE WILSON,	)	CV 493-36
Plaintiffs,	)	
- vs -	)	
ALEXANDER'S POWER SHIPPING CO., LTD	)	
Defendant.	)	

MOTION FOR SUMMARY JUDGMENT SUBJECT TO DEFENDANT'S PREVIOUSLY-ASSERTED OBJECTION TO SERVICE OF PROCESS

NOW COMES, the defendant, Alexander's Power Shipping Co., Ltd. and, subject to its previously-asserted objection to service of process, moves the court for summary judgment in its favor pursuant to Rule 56 of the Federal Rules of Civil Procedure and shows there is no genuine issue as to any material fact and defendant is entitled to a judgment as a matter of law. The grounds for the

motion are as follows:

1) Plaintiff has filed suit under Section 905(b) of the Longshore and Harbor Workers' Compensation Act, 28 U.S.C. §901, et seq., for injuries he allegedly sustained when in broad daylight he slipped on an oil slick located on the weatherdeck of the Motor Vessel ALEXANDER'S POWER. He was a stevedore superintendent for Allsouth Stevedoring Company which was in charge of loading cargo on the ship.

2) The evidence before the Court in the form of an affidavit by Jon W. Latiolais, who observed the oil slick just after the alleged accident, is that the slick was out in the open on the ship's wheatherdeck in plain sight in broad daylight. It was shiny and distinct in appearance and was easily noticeable on the ship's deck. There was sufficient space on the deck around the oil so that someone walking on the deck could easily avoid stepping in it.

3) Plaintiff has the burden of proving that defendant shipowner breached its duty to warn the stevedore of any hidden defects that would be known to the shipowner in the exercise of reasonable care and to exercise reasonable care to deliver to the stevedore a safe ship with respect to gear, equipment, and workplace.

4) The shipowner's duty as stated is not breached if the condition causing the stevedore's accident was open and obvious or one that the

stevedore should have anticipated if reasonably competent in his work. Scindia Steam Navigation Co., v. De Los Santos, 451 U.S. 156, 167 (1981).

5) Additional evidence before the court in the form of affidavits from former stevedore superintendent Robert C Stone and marine surveyor Harry E. Jennings is that the presence of oil and grease on a merchant ship's weatherdeck is a common safety hazard which an experienced stevedore superintendent such as the plaintiff would anticipate, watch for, and avoid. Oil and grease on the weatherdeck is a fact of life which a reasonably competent stevedore would anticipate.

6) The material facts in the case, as set forth in the mentioned affidavits, are that the oil on the ship's deck was not hidden, was open and obvious and would have been seen or anticipated by an attentive stevedore reasonably competent in his work. Therefore defendant had no duty to warn plaintiff of the presence of the oil on the weatherdeck.

7) Based on the material facts, plaintiff cannot satisfy his burden of proving that the oil slick was hidden and would not have been seen or anticipated by a stevedore reasonably competent in his work. Since plaintiff cannot show this essential element with respect to which he bears the burden of proof, defendant is entitled to a judgment as a matter of law.

Defendant respectfully prays that summary

judgment be entered in its favor.

This 27th day of April, 1993.

CHAMLEE, DUBUS & SIPPLE

/S/

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Georgia State Bar No. 649200
Attorneys for Defendant
Alexander's Power Shipping Co., Ltd.
P.O. Box 9523
Savannah, Georgia 31412
(912) 232-3311

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

****

JAMES T. WILSON and ELAINE WILSON,	)	**CV 493-36**
Plaintiffs,	)	
- vs -	)	
ALEXANDER'S POWER SHIPPING CO., LTD	)	
Defendant.	)	

****

Personally appeared before me an officer authorized to administer oaths, Robert C. Stone, who first being duly sworn deposes and states:

(1) My stevedoring experience includes the following: employed by Strachan Shipping Company, a stevedoring company having its head office in Savannah, Georgia, in the stevedoring gear maintenance department from 1960 to 1964; transferred to Strachan Shipping's stevedoring department and worked as a foreman in charge of stevedoring on board ships of all types calling at

Savannah including break bulk, container, and tanker vessels from approximately 1964 to approximately 1974; continued my employment with Strachan Shipping as assistant stevedoring superintendent in charge of loading and discharging operations on ships from 1974 to approximately 1977; employed as general stevedore superintendent for Eller & Company in Savannah in charge of stevedoring vessels from approximately 1979 to 1981; and employed as general stevedore superintendent for Stevens Shipping & Terminal Company in charge of stevedoring on board vessels at Savannah, Charleston, Brunswick, and Jacksonville from 1986 to 1988.

(2) During my stevedoring experience I have spent considerable time on the weather decks and in other areas of ships of all kinds at Savannah, Charleston, Brunswick, and Jacksonville. I am familiar with the various safety hazards commonly found on merchant vessels including the presence of oil and grease on the weather decks.

(3) Based on my experience, it is the responsibility of the stevedore superintendent or foreman prior to the commencement of cargo operations on a merchant vessel to conduct a safety inspection of the ship's holds, decks, and other walking and working areas in order to make sure they are free of conditions which could present a safety hazard for the longshoremen in the performance of their work on the vessel.

(4) Oil and grease are common safety

hazards found on the weather deck of a merchant vessel. Because the presence of oil and grease on the weather deck is so commonplace, an experienced stevedore superintendent or foreman should anticipate and watch specifically for this particular hazard during his pre-cargo operation safety inspection as well as at all other times on the ship. A stevedore superintendent or foreman who is reasonably competent in the performance of his work should anticipate, watch for, and avoid oil and grease on the weather deck. Sources of oil and grease found on the deck include the ship's cranes and winches, mechanical hatch covers, cargo wires and cables, hydraulic lines, deck cargo consisting of motorized vehicles and equipment, and drum cargo.

(5) Based on my experience, I am familiar with and was responsible for complying with the Federal Safety and Health Regulations for the Longshoring Industry (29 CFR 1918). One of these regulations requires a stevedoring company to eliminate slippery conditions such as oil or grease on a ship's deck as these conditions occur. (29 C.F.R. § 1918.91 (c)). Another regulation provides that in instances where the ship's deck is wet with oil, the stevedore may not permit longshoremen to work until necessary walking and working areas have been made safe by the use of suitable non-skid materials (29 C.F.R. § 1918.38). In order to comply with these regulations, it is the responsibility of the stevedore superintendent or foreman prior to the beginning of cargo operations to inspect the weather deck and other walking and working areas of the vessel for oil and grease and

make sure that slippery conditions created by these hazards are corrected before the longshoremen start their work on the ship.

(6) In my experience, it is common that oil and grease will be found on the weather deck of a cargo ship. For this reason, an experienced stevedore reasonably competent in his work must anticipate the presence of oil and grease on a ship's deck. This hazard is a fact of life in working aboard a merchant vessel.

(7) This affidavit is based on my personal knowledge and experience and I am competent to testify to the matters stated herein. The affidavit is given for use in the captioned proceeding.

/S/
Robert C. Stone

Sworn to and subscribed before
me this 23rd day of April, 1993:

/S/
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

****

JAMES T. WILSON and ELAINE WILSON,	)	CV 493-36
Plaintiffs,	)	
- vs -	)	
ALEXANDER'S POWER SHIPPING CO., LTD	)	
Defendant.	)	

****

Personally appeared before me an officer authorized to administer oaths, Harry E. Jennings, who first being duly sworn deposes and states:

(1) My seamanship and marine surveying experience includes the following: service as an apprentice seaman on merchant vessels operated by Turnbull, Scott & Co. from 1935 to 1939; service on merchant ships owned by Prince Line in world-wide operations from 1940 to 1953, working way from third officer to position of master; from 1953 to 1955 served as chief officer-staff captain on Furness Bermuda Line for Bermuda and Caribbean

Cruises; employed as assistant stevedore superintendent for Bay Ridge Operating Co. in New York, the stevedoring branch of Furness Withy & Co, from 1955 to 1956; employed as marine surveyor for T.D. Baker & Co. in New York conducting marine cargo surveys on board vessels and in other areas from 1956 to 1970; employed by Charles T. Theus & Co. in Savannah, Georgia as marine surveyor conducting marine cargo surveys and casualty investigations on ships and in other areas from 1970 to 1988; formed own company, Savannah Marine Consultants, in 1988 and am presently conducting marine cargo surveys and casualty investigations both on and off ships.

(2) Based on my experience in serving on and conducting marine surveys and casualty investigations on merchant vessels, oil and grease are two of the most common hazards found on the weather deck of a merchant ship. In my experience it is quite common that oil and grease will be found on the weather deck of a cargo ship.

(3) There are many sources of the oil and grease found on the weather deck including ship's cranes, winches, mechanical hatch covers, hydraulic lines, and cargo wires and cables.

(4) Oil and Grease on a ship's deck are hazards which an experienced stevedore who is reasonably competent in the performance of his work should anticipate, watch for, and avoid.

(5) This affidavit is based on my

personal knowledge and experience and I am competent to testify to the matters stated herein. The affidavit is given for use in the captioned proceeding.

/S/

Harry E. Jennings

Sworn to and subscribed
before me this 14th day
of April, 1993:

/S/

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

****

JAMES T. WILSON and ELAINE WILSON,	)	CV 493-36
Plaintiffs,	)	
- vs -	)	
ALEXANDER'S POWER SHIPPING CO., LTD	)	
Defendant.	)	

****

Personally appeared before me an officer authorized to administer oaths, Jon W. Latiolais, who first being duly sworn deposes and states:

1) I reside at 61154 North Tranquility Drive in Lacombe, Louisiana and am employed by Gulf South Systems, Inc. located in New Orleans, Louisiana.

2) In April of 1991 I was employed by Alexco Shipmanagement (Hellas) Ltd. as a cargo superintendent. My job was to attend vessels for which Alexco acted as agent and monitor cargo

operations at the various load ports. I left my employment with Alexco in late 1991.

3) On April 17, 1991 I was attending the Motor Vessel ALEXANDER'S POWER on behalf of Alexco Shipmanagement while the vessel was loading lumber at East Coast Terminal at Savannah, Georgia. Allsouth Stevedoring Company of Savannah was in charge of the loading operation.

4) While I was on board the vessel early on the morning of April 17, one of the Allsouth stevedores reported to me that stevedore superintendent James Wilson had slipped on some oil on the weather deck of the ship. I was told the accident had just occurred.

5) I immediately accompanied the stevedore to an area on the weather deck near the forward starboard end of the number two hatch. The stevedore then showed me a slick of what appeared to be some type of oil which covered an area on the deck about two feet wide and two feet long. I did not see any oil running from the ship's crane located in the vicinity of the slick.

6) The slick of oil was shiny and was very distinct in appearance from the deck area underlying and surrounding it. The slick was out in the open and there was nothing obstructing it from view. The oil was easily noticeable on the deck and I had no difficulty seeing it. The color of the oil was reddish brown.

7) It was broad daylight at the time the accident was reported to me shortly after 7:50 a.m. on april 17, 1991.

8) There was sufficient space on deck around the slick so that someone walking the deck could easily avoid stepping in the oil.

9) The foregoing affidavit is based on my personal knowledge and experience and I am competent to testify to the matters stated herein. The affidavit is given for use in the captioned proceeding.

/S/
Jon W. Latiolais

Sworn to and subscribed before
me this 21st day of April, 1993.

/S/
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

JAMES T. WILSON and ELAINE WILSON,	)	CV 493-36
Plaintiffs,	)	
- vs -	)	
ALEXANDER'S POWER SHIPPING CO., LTD	)	
Defendant.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NOW COME Plaintiffs, JAMES T. WILSON and ELAINE WILSON and file their response to Defendant's Motion For Summary Judgment as follows:

1.

Plaintiffs admit the allegations set forth in paragraph one to Defendant's Motion for Summary Judgment, but allege, as set forth in the Complaint, and as stated in the affidavit of Donald Klages

(Exhibit "A"), James Wilson (Exhibit "B") and Sam Hughes (Exhibit "C") the oil which originated from Defendant's crane was transparent and could not be seen on the dew covered deck. Therefore, the transparent oil constituted a hidden hazard. Moreover, because of the manner in which Defendant had stowed lumber at other previous ports, the oil was in a location that would not have been readily visible to stevedores walking from aft to forward on the starboard side, weather deck (even if it was, otherwise, detectable).

2.

Plaintiffs acknowledges that the affidavit of Jon W. Latiolais claims that he could see the oil. However, based on evidence that Plaintiff James T. Wilson has offered in this response, Affidavit of James T. Wilson (Exhibit "B") and Sam Hughes (Exhibit "C"), Plaintiffs question the accuracy of this witness, an employee of Alexco Shipmanagement (Hellas) Ltd., the manager for the M/V ALEXANDER'S POWER, a company whose sole director is Alexander Coutroumanides. Mr. Coutroumanides was the sole director of Defendant Alexander's Power Shipping Co., Ltd. Moreover, Mr. Latiolais' affidavit differs drastically from those of three Allsouth personnel whose affidavits are offered in response to Defendant's Motion for Summary Judgment. Because of the questions raised about ability to see the oil there is, at the least, a question of fact whether it constituted a hidden hazard.

3.

Plaintiffs deny that the statement contained in paragraph three is an accurate statement of the law governing a stevedore's right to recover under Section 905(b) against a shipowner. Moreover, as set forth in the Affidavit of Donald Klages (Exhibit "A"), and other affidavits, the transparent oil on a dew covered deck constituted a hidden hazard which neither he, looking specifically for oil, nor Plaintiff, nor Plaintiff's fellow stevedore, Sam Hughes, observed prior to the incident.

4.

Plaintiffs deny that this statement of law is an accurate statement of the ship owner's obligations. The allegations in paragraph four do not accurately encompass a shipowner's obligation to a stevedore. If the conditions are open and obvious, but were part of the vessel or its appurtenance a vessel owner has potential liability to a stevedore/longshoreman and, thus, is not entitled to a judgment as a matter of law.

5.

Plaintiff questions the relevance of the Affidavits taken from Robert C. Stone and Harry E. Jennings, neither of whom was present on the vessel. In contradistinction to these general affidavits, Donald Klages, Safety Director for Allsouth, stated specifically in his affidavit (Exhibit "A") that an integral part of his job as a Safety

Director on that morning was to check for the presence of oil. Covering the same route taken by Plaintiff, Mr. Klages did not notice the oil on the dew covered deck and could not detect it until after the injury - he rubbed the deck and determined that there was transparent oil on it (neither did Plaintiff's co-stevedore, Sam Hughes (Exhibit "C"). This oil originated from the ship's crane house and constituted a hidden hazard caused by the vessel and which existed on the vessel before its turn over to the stevedores.

6.

Plaintiffs deny paragraph number six of the Defendant's Motion for Summary Judgment. Because the oil constituted a hidden hazard which was created before the vessel was turned over to the stevedores, Defendant is deemed to have actual notice of it and, therefore, had an obligation to inspect and warn Plaintiff and other stevedores of its presence. Moreover, even if there is an open and obvious hazard which originates from the vessel or its appurtenances prior to turn over, the vessel owner has potential liability to a stevedore - to be determined by the trier of fact.

7.

Plaintiffs deny paragraph seven of the Defendant's Motion for Summary Judgment.

8.

In Support of its response to Defendant's Motion for Summary Judgment, Plaintiff enclosed

the affidavits of James T. Wilson (Exhibit "B"), Donald J. Klages (Exhibit "A"), and Samuel W. Hughes (Exhibit "C").

WHEREFORE, based on the foregoing Plaintiff respectfully requests that this Court deny Defendant's Motion for Summary Judgment.

This the 21st day of May, 1993.

BOUHAN, WILLIAMS & LEVY

By:_____/S/_____
Edwin D. Robb, Jr.
Georgia State Bar # 33490
Attorney for Plaintiffs
Post Office Box 2139
Savannah, GA 31498-1001
(912) 236-2491

CERTIFICATE OF SERVICE

I Edwin D. Robb Jr., do hereby certify that I have this day served the foregoing Plaintiff's Response to Defendant's Motion for Summary Judgment by placing a copy of the same in the United States mail, with proper postage affixed to assure delivery, to counsel of record as follows:

David Sipple, Esq.
Chamlee, Dubus & sipple
P.O. Box 9523
Savannah, Georgia 31412

This the 21st day of May, 1993.

BOUHAN, WILLIAMS & LEVY

By: /S/
Edwin D. Robb, Jr.
Georgia State Bar # 33490
Attorney for Plaintiffs
Post Office Box 2139
Savannah, GA 31498-1001
(912) 236-2491

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

JAMES T. WILSON and ELAINE WILSON,	)	**CV 493-36**
Plaintiffs,	)	
- vs -	)	
ALEXANDER'S POWER SHIPPING CO., LTD	)	
Defendant.	)	

AFFIDAVIT

PERSONALLY APPEARED before me, the undersigned duly authorized to administer oaths, DONALD J. KLAGES, who, after being duly sworn, on oath, deposes and says:

1. Deponent lives at 21 Pheasant Run, Hilton Head Island, South Carolina 29226. Deponent is

EXHIBIT A

retired from Strachan Shipping Company, Savannah, Georgia. At time of retirement, Deponent was the safety director for Strachan Shipping Company. On April 17, 1991, Deponent was employed by Allsouth Stevedores as the Safety Director.

2. Since 1958, Deponent has either been a Safety Director or has been in the operations department of various stevedoring companies located along the East coast of the United States. Also, from 1959-1963, Deponent was a Safety Director with the U.S. Department of Labor in Baltimore, Maryland. In 1983, Deponent moved to Savannah, Georgia, where he was employed by Southeast Atlantic Cargo Operators, as the vice-president of operations. In November of 1989, Deponent became the Safety Director for Allsouth. Subsequently, Deponent joined Strachan Shipping Co. and retired from Strachan Shipping Co. on March 31, 1993.

3. One part of a Safety Director's job for a Stevedoring Company, is to check on the conditions of decks and holds prior to commencement of loading operations. Customarily, a Safety Director, will board a vessel prior to the start of loading operations and, among other things, will check for oil or debris on decks and in the cargo holds as well as other conditions that might be dangerous to stevedores and longshoremen.

4. On April 17, 1991, Allsouth was scheduled to load cargo on the M/V ALEXANDER'S

POWER which was moored at East Coast Terminals in Savannah, Georgia. Allsouth Stevedores and Longshoremen were scheduled to commence work at 0800 on that date.

5. Prior to 0800, and thus prior to arrival of any longshoreman aboard the M/V ALEXANDER'S POWER, Deponent boarded the vessel to check on conditions of the decks and in the cargo holds. Deponent started his inspection on the after starboard side of the vessel's weather deck. Deponent walked forward along the starboard side.

Several bundles of lumber had been previously stowed at another port on the weather deck between the bulwark and the hatches. Thus, Deponent was required to walk on some of the lumber as he was proceeding from aft to forward along the starboard weather deck. Covering the weather deck at that time in the morning was a layer of dew.

6. One bundle of lumber was stowed on the starboard weather deck adjacent to hold #2. Accordingly, in order to proceed forward towards the #1 hold which Allsouth was scheduled to work, Deponent walked on the lumber. There was no bundle of lumber immediately forward of the bundle stowed adjacent to hold #2. As Deponent neared the forward part of hold #2, he stepped from the bundle of lumber directly onto a metal pipe guard which was outboard of a ship's crane house. Deponent's route of travel is shown in a photograph (marked Exhibit "2" to this affidavit). The route of

travel is depicted by a dotted line. Deponent's course of travel from the pipe guard to the weather deck is depicted in Exhibit "2" to this affidavit.

After stepping onto the pipe guard, which was adjacent to a ship crane's house, Deponent then stepped onto the weather deck which was covered with dew. Deponent did not observe the presence of any oil on the deck. Deponent then continued on to hold #1 and completed his inspections. Then Deponent started to walk aft on the starboard weather deck. Mr. Wilson was walking towards Deponent.

7. Deponent saw Mr. Wilson step from the lumber onto the pipe guard and then also saw him step from the pipe guard onto the weather deck at a point several feet aft from the point which Deponent had stepped onto the weather deck. The point where Mr. Wilson stepped onto the weather deck was covered with dew. Deponent then saw Mr. Wilson slip and fall backwards. The time was approximately 0750. The point at which Mr. Wilson fell is depicted by a "0" on Exhibit "1". Deponent notes that at the time that the photograph, Exhibit "1", was taken, crew members had placed saw dust at the point where Mr. Wilson had fallen.

8. Deponent then went to the site where Mr. Wilson had fallen and rubbed his hand along the deck. At that point, for the first time, Deponent noticed that there was transparent/clear oil on the deck which also was covered with dew. When Deponent was walking along the pipe guard at hold

#2, Deponent could not determine that oil was present on the dew covered deck, because the transparent oil could not be distinguished from the dew that was on deck.

9. After Mr. Wilson fell, Deponent asked a crew member of the M/V ALEXANDER'S POWER to place sawdust on the deck where Mr. Wilson had fallen. The crew member and Deponent then tried to determine the origin of the oil. The crew member, whose name is not known to Deponent, then informed Deponent that the oil had originated from the ship crane's house which contains a series of hydraulic lines. As Deponent determined after the fall, the oil ran from the crane house under the pipe guard to the point where Mr. Wilson stepped from the pipe guard onto the weather deck.

10. At the time in which Mr. Wilson was injured, no longshoremen had worked aboard the vessel since its arrival in Savannah. Prior to the incident, Deponent saw crew members on weather deck. During that day, Deponent did not have any conversations with any representative of the vessel other than with members of the vessel's actual crew.

11. Sometime later in the morning, Deponent took the photographs of the area where Mr. Wilson fell (marked Exhibit 1 & 2). Deponent then returned to his office and drafted a written report of the incident which he gave to the chief officer of the ALEXANDER'S POWER, Jan Tokarz.

This Affidavit is given in support of the response to Defendant's Motion for Summary Judgment and is based upon the personal knowledge of Deponent.

/S/
DONALD J. KLAGES

SWORN TO AND SUBSCRIBED before me this 18th day of May, 1993.

/S/
Kelli Lynn Beacham
Notary Public
My Commission Expires: October 25, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

JAMES T. WILSON and ELAINE WILSON,	)	**CV 493-36**
Plaintiffs,	)	
- vs -	)	
ALEXANDER'S POWER SHIPPING CO., LTD	)	
Defendant.	)	

AFFIDAVIT

PERSONALLY APPEARED before me, the undersigned duly authorized to administer oaths, JAMES T. WILSON, who, after being duly sworn, on oath, deposes and says:

1. Deponent, James T. Wilson, is a resident of Richmond Hill, Bryan County, Georgia. On April

EXHIBIT B

17, 1991, Deponent was a Stevedoring Superintendent for Allsouth Stevedoring Company, Savannah, Georgia. Deponent has been a stevedore in Savannah for over 15 years. Allsouth was to load cargo aboard the M/V ALEXANDER'S POWER, moored at East Coast terminal, Savannah, Georgia.

2. The M/V ALEXANDER'S POWER docked at East Coast Terminals on April 16, 1991. Allsouth Stevedores and Longshoremen were scheduled to commence loading operations at 0800 on April 17, 1991. At approximately 0745, Deponent, in the company of Donald J. Klages, Allsouth's Safety Director, and Sam Hughes, an Allsouth Stevedore who was the other Allsouth stevedore scheduled to work the vessel, boarded the vessel. At that time, there were no longshoremen aboard the vessel and, thus, work had not yet commenced. Crew members were aboard the vessel and were on the weather deck. At the time that deponent boarded the vessel, the ship's crew had recently opened the hatches. The vessel had McGregor hatch covers which operated hydraulically.

3. Deponent's purpose in boarding the vessel before the commencement of work was to decide which gear and forklifts, if any, Allsouth would require in order to load cargo into the holds of vessel.

The M/V ALEXANDER'S POWER was moored starboard side to the pier. After Mr.

Klages, Mr. Hughes and Deponent boarded the vessel on the starboard side, Mr. Klages and Mr. Hughes preceded Deponent in walking from aft to forward on the starboard weather deck which was covered with dew. As shown in a photograph of the starboard weather deck (Exhibit #1 to this Affidavit) bundles of lumber that had been stowed at other previous ports, blocked the access on the port and starboard weather decks. Therefore, in order to proceed from aft to forward, Mr. Klages, Mr. Hughes and Deponent were required to walk on top of the bundles of lumber. The bundles of lumber were approximately 3 ft. - 4 ft. above the weather deck.

4. A bundle of lumber was immediately outboard of hold number two (2). The bundle of lumber extended to the forward part of hold number two (2). Immediately adjacent to and outboard of hold number two (2) was a pipe guard which ran along the weather deck. (approximately 12-18 ft. above the deck). The purpose of a pipe guard is to protect piping systems which run along the deck.

5. After Deponent walked to the forward end of the bundle of lumber adjacent to hold number two (2), he stooped down, put his right hand on the lumber, stepped directly from the lumber down onto the pipe guard, turned to his right and then stepped immediately onto the weather deck. (As shown in Exhibit #2). Deponent's intention was to walk to the starboard rail on the weather deck and give instructions to the ILA walking boss on the pier. Mr. Klages and Mr. Hughes headed to hold # 1.

As soon as Deponent stepped onto the deck, he slipped and fell on the deck. Although Deponent looked at the conditions of the weather deck in that area, he could not detect what was later found to be transparent oil on the dew covered deck. Deponent had previously walked on the dew covered deck without any difficulty. The place on the deck where Deponent stepped was not easily detected while stepping down from the lumber. The reason was that the lumber partially obstructed his view of the deck immediately below the lumber. (as shown on Exhibits #1 & #2 to this Affidavit). Exhibit #2 shows the route that Deponent took in stepping from the lumber to the pipe guard to the deck. The photographs, Exhibit #1 and #2, were provided to Deponent by Donald Klages. It would appear that when these photographs were taken, the dew had dissipated.

6. As Deponent slipped on the deck, his feet went out from under him and his hard hat struck the deck. Although Deponent never noticed that there was transparent oil on the dew covered deck, he can state that the spot in which he fell was slippery, unlike the dew covered deck that he had previously walked on during his route from aft to forward on the starboard weather deck. None of the ship's crew or other vessel representative had warned Plaintiff that there had been an oil leak/spill.

7. For about 20 minutes after the fall, Deponent was dazed. After he recovered from the initial shock of the fall, he started to work and was able to work that day. Later during the day,

Deponent noticed that someone had placed sawdust on the place where Deponent had fallen.

This Affidavit is given in support of Plaintiffs' Response to Defendant's Motion for Summary Judgment and is based upon the personal knowledge of Deponent.

/S/
JAMES T. WILSON

SWORN TO AND SUBSCRIBED before me this 21st day of May, 1993.

/S/
Kelli Lynn Beacham
Notary Public
My Commission Expires: 10/25/93

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

****

JAMES T. WILSON and ELAINE WILSON,	)	**CV 493-36**
Plaintiffs,	)	
- vs -	)	
ALEXANDER'S POWER SHIPPING CO., LTD	)	
Defendant.	)	

****

AFFIDAVIT

PERSONALLY APPEARED before me, the undersigned duly authorized to administer oaths, SAMUEL W. HUGHES, who, after being duly sworn, on oath, deposes and says:

1. Deponent, Samuel W. Hughes, lives at 9301 Dunwoody Drive, Savannah, Georgia 31406. Deponent is employed as a stevedore foreman for Strachan Shipping Company, Savannah, Georgia. On April 17, 1991, Deponent was employed by

EXHIBIT C

Allsouth Stevedores as a stevedore foreman. On April 17, 1991, Deponent, along with James T. Wilson, was to act as stevedore foreman in connection with loading of cargo aboard the M/V ALEXANDER'S POWER, East Coast terminal, Savannah, Georgia. Mr. Wilson was to be the superintendent.

2. Work was to commence at 0800 on April 17, 1991. Shortly prior to that time, Donald J. Klages, Allsouth's safety director, Mr. Wilson and Deponent boarded the vessel by means of a gangway which was located in the after starboard side of the vessel. The vessel was moored starboard side to the pier.

3. The reason that Deponent and Mr. Wilson boarded the vessel before commencement of work was to check the condition of the holds, stowage for the holds and also to determine the type gear that Allsouth would use in loading the vessel.

4. When Deponent boarded the vessel on the after starboard weather deck, he noticed that bundles of lumber had been stowed at a previous port on both the port and starboard weather decks. Therefore, in order to check on the conditions of all of the holds, it was necessary to walk on the bundles of lumber - as Mr. Klages, Mr. Wilson and Deponent proceeded aft to forward on the starboard weather deck.

5. As they walked forward, Mr. Wilson and Deponent would step from a bundle of lumber onto

the pipe guard so that they could look into the vessel's holds. The ship's crew had recently opened the hatches. The pipe guards are located adjacent and outboard of the holds. The pipe guards extend about one foot above the weather deck.

6. At some point, Deponent proceeded ahead of Mr. Wilson as they were walking up the starboard side of the vessel. When Deponent and Mr. Wilson reached the after part of hold number 2, Deponent noticed that Mr. Wilson stopped at that point. Deponent then proceeded from the bundle of lumber at hold number 2 down onto the pipe guard and then down onto the weather deck. Deponent then proceeded up the weather deck to hold number 1. Shortly before Deponent reached hold number 1, he heard a noise, turned around and saw Mr. Wilson lying on the deck forward of the bundle of lumber at the forward part of hold number 2.

7. When Deponent had been walking in the area of hold number 2, he had not noticed any oil. After Mr. Wilson fell, Deponent came back to assist Mr. Wilson. At that time, Mr. Klages was also present.

8. Deponent recalls that there may have been two vessel cargo superintendents aboard the vessel that day. Deponent recalls the names of Jon and Jr. Deponent recalls talking to these men sometime during the loading of the ship that day. However, Deponent does not recall discussing any aspect of Mr. Wilson's fall with them. In particular,

Deponent does not recall ever pointing out the place where Mr. Wilson fell to either of the two cargo superintendents.

This Affidavit is given in support of Plaintiffs' Response to Defendant's Motion for Summary Judgment and is based upon the personal knowledge of Deponent.

/S/
SAMUEL W. HUGHES

SWORN TO AND SUBSCRIBED before me
this 17th day of May, 1993.

/S/

Kelli Lynn Beacham
Notary Public
My Commission Expires: October 25, 1993

KLAGES DEPOSITION EXCERPTS

SIPPLE-KLAGES

Q. What kind of oil was this?

A. I have no idea what kind of oil it was. It was a transparent oil. That's all I can tell you.

Q. Can you say whether it was a hydraulic oil?

A. I can't tell you whether it was hydraulic oil or not.

Q. Was it totally transparent or was there some color to it?

A. There was no color to it.

Q. Totally transparent?

A. Yes, sir.

Q. How much of the deck area did it cover?

A. Well, you can see where the sawdust is. That's approximately the area where -- I did not have a camera at the time so I couldn't take pictures of that at the time. But they had the sawdust. This is the area where the oil was.

(whereupon, photograph was marked Defendant's Deposition Exhibit Number 2 for identification.)

BY MR. SIPPLE:

Q. I'll show you a photograph that the court reporter has marked as defendant's exhibit number 2. Does that show the area where the oil was located?

A. Yes it does.

Q. And did you take that photograph?

A. Yes, I took the photograph.

Q. All right. Could you show me the area where the oil was and how much of the deck area it --

A. It was running from here down in this area here to the best of my recollection.

Q. Can I get you to use this red pen and kind of shade in the area of the deck that the oil covered?

A. (Witness complies.)

Q. Okay. So you have taken a red pen and kind of shade in the area of the deck that the oil

covered on the deck?

A. (witness complies).

Q. Okay. so you have taken a red pencil and marked on the photograph the area that the oil covered on the deck?

A. Yes.

Q. After the accident and before you reached down to Put your hand on the deck, could you see that there was a foreign substance on the deck?

A. The only substance I saw it appeared to be water.

Q. Condensation?

A. Yes.

Q. Could you -- looking at the area where you ultimately discovered the oil could you tell that there was a foreign substance there in addition to the dew or condensation?

A. No.

Q. If you say stood on the pipe guard and looked directly down onto the area where you discovered the oil, could you tell that there was something on the deck other than just dew?

A. Not really. That's why I had to put my -- I had to go down and feel it to ascertain it was oil in the first place.

. . .

Q. But there was no way to -- as a practical matter to visually detect the presence of this oil where it was?

A. That's true.

Q. Did the deck and the area where the oil was located look any difference from the surrounding deck area?

A. No, it did not.

Q. And you noticed nothing distinctive about the area of the deck where the oil was? There was nothing that distinctive or different about the area of the deck where the oil was as compared with the surrounding deck area?

A. That's correct.

Q. Was there anything at all about the appearance of the deck in the area where you discovered the oil that would suggest that there Might be a foreign substance on the deck, that is, something other than just dew?

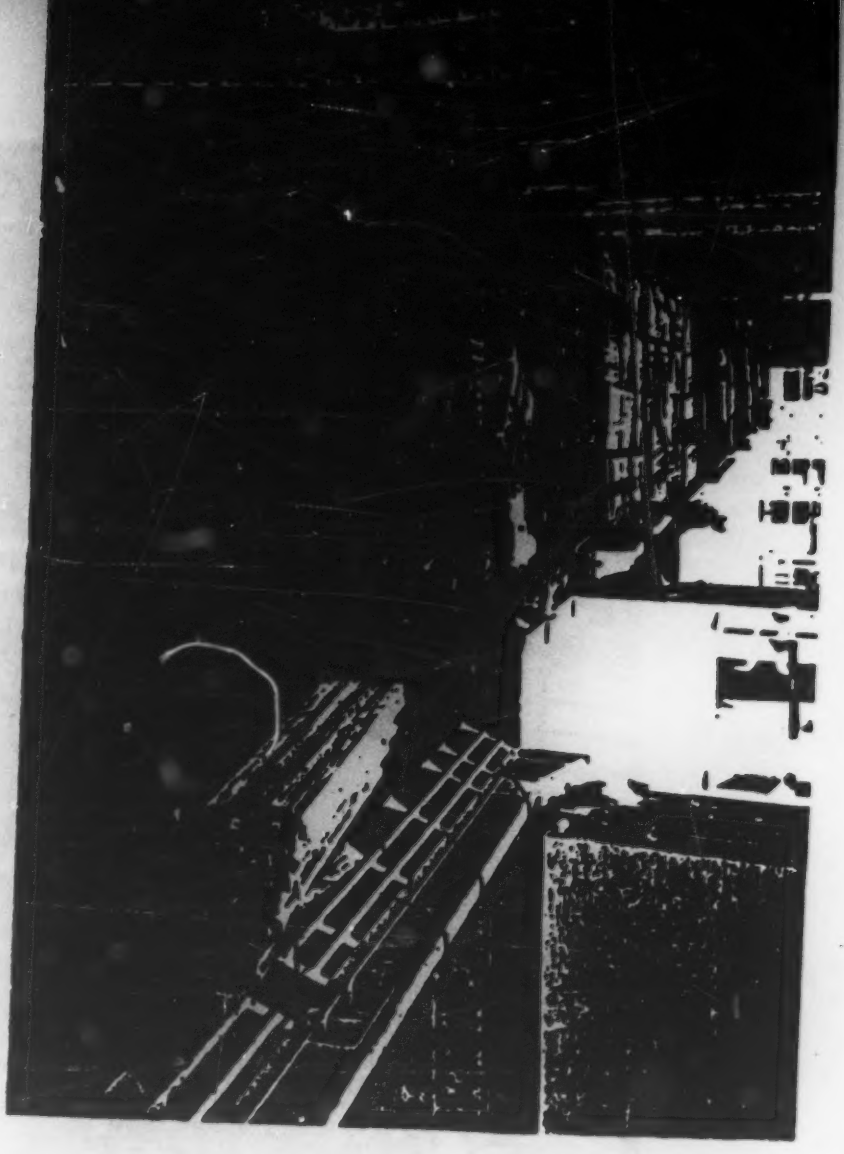
A. Let me have the question again.

Q. In other words, was there anything about the appearance of the deck in the area where you discovered the oil that would suggest that there was a foreign substance on the deck in that area other than the dew?

A. No.

Q. So the only way as a practical matter to detect this oil on the deck was to get down and feel it with your hands?

A. That's correct sir.



Supreme Court, U.S.
FILED
MAR 24 1995
OFFICE OF THE CLERK

No. 94-1436

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JAMES T. WILSON and ELAINE WILSON,
Petitioners,

v.

ALEXANDER'S POWER SHIPPING CO., LTD.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION

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Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED FOR REVIEW

1) Whether this case is suitable for review where the thrust of petitioners' argument is simply that the District Court erred in granting summary judgment when there are issues of material fact to be decided by a jury.

2) Where it is undisputed that oil is commonly found on a ship's deck and an experienced stevedore-supervisor not only anticipates finding oil but is actually inspecting the deck specifically for oil at the time of the accident, whether the District Court committed error in holding, on these specific facts, that the oil on the deck did not constitute a breach of the shipowner's turnover duty of safe condition.

3) Where it is undisputed that oil on a ship's deck is routinely encountered and reasonably to be expected by an expert stevedore and an experienced stevedore-supervisor is actually inspecting the deck for oil at the time of the accident, whether the District Court committed error in holding, on these specific facts, that the shipowner had no duty to warn the stevedore of the oil.

LIST OF PARTIES PURSUANT TO RULE 29.1

Upon information and belief, Respondent Alexander's Power Shipping Co., Ltd. is now defunct. Assurance-foreningen Gard of Arendal, Norway, a protection and indemnity association of shipowners, has an interest in this case as underwriter for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1436

JAMES T. WILSON and ELAINE WILSON,
Petitioners,

v.

ALEXANDER'S POWER SHIPPING CO., LTD.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner James T. Wilson was a stevedore superintendent, a supervisory employee, not merely a foreman as stated by petitioners in their Statement Of The Case and not an ordinary longshoreman. He has over fifteen years experience as a stevedore. [Wilson affidavit ¶ 1, petitioners' brief, p. 47a]. At the time of the accident petitioner Wilson along with Safety Director Klages and Stevedore Hughes were inspecting the ship's decks and cargo holds. [Klages affidavit ¶ 5, petitioners' brief,

p.42a; Hughes affidavit ¶ 3, petitioners' brief, p.52a; petitioners' brief, p.8]. It was broad daylight. [Def's Statement Of Material Facts #5 (2a) and Plaintiff's Response (6a)].

Petitioners state that Superintendent Wilson did not expect to find oil on the ship's deck during his inspection. However petitioners' admissions in the case show the contrary. Petitioners admit that Stevedore Superintendent Wilson routinely inspects for oil on the weather deck [Def's Statement Of Material Facts #18 (3a) and Plaintiff's Response (8a); petitioners' brief, p.8] and that he was actually inspecting and looking specifically for oil on the weather deck at the time of the accident. [Plaintiffs' Response To Defendant's Statement Of Material Facts ##13 and 19 (7a, 8a); petitioners' brief, p.8; ¶ 3, Plaintiffs' Response To Def.'s Motion For Summary Judgment, petitioner's brief (36a)]. Moreover petitioners admit that oil is commonly found on the weather deck of a cargo ship [Def's Statement Of Material Facts #11 (2a) and Plaintiffs' Response (7a); petitioners' brief, p.7] and that an experienced stevedore must anticipate and watch specifically for oil on the weather deck. [Def's Statement Of Material Facts #19 (3a) and Plaintiff's Response (8a)]. Given these admissions, petitioners can hardly argue that Superintendent Wilson did not expect and anticipate oil on the weather deck of the ship. The District Court was clearly correct in making this logical inference based on petitioners' admissions.

Petitioners state that the oil on which Superintendent Wilson slipped was located "beneath" a bundle of stowed lumber on the deck. [petitioners' brief, pp. 5, 19]. However the sawdust placed over the oil on the deck as shown in the photograph in petitioners' brief (61a) reveals that the oil was next to or in front of the bundle, not beneath it as asserted by petitioners.

Petitioner's response to Respondent's Motion for Summary Judgment presented no evidence to pierce Respond-

ent's contention that it had no knowledge of oil on the deck, so as to create an issue of fact for trial. Petitioners merely asserted by affidavit that there were crewmembers on the weather deck at the time Stevedore Superintendent Wilson and his party boarded the vessel to conduct his inspection and that the ship's crew had recently opened the hatches. [Wilson affidavit, ¶ 2, Petitioners' brief p. 47a]. These facts are insufficient to create an issue that Respondent had actual or constructive knowledge of the oil.

SUMMARY OF ARGUMENT

This case is not certworthy. The issue presented by petitioners is whether the Eleventh Circuit erred in taking the case from the jury by way of affirmance of the District Court's summary judgment when there were genuine factual questions to be decided. This issue is not one recognized by Supreme Court Rule 10 as justifying the grant of a writ of certiorari. In addition, there are no special or important reasons for this court to review the District Court's holding that there are no material factual issues for trial. The principles applied by the District Court have only recently been reaffirmed by this court in *Howlett v. Birkdale Shipping Co.*, 512 U.S. ——, 129 L.Ed.2d 78 (1994) and the lower court's decision is not in conflict with the prior decisions of this court or any other circuit.

Respondent shipowner did not breach its duty to turn over the vessel to the stevedore in such condition that an expert and experienced stevedore, mindful of the dangers he should expect to encounter in his job, can conduct cargo operations safely. *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 416 n.18 (1969); *Howlett v. Birkdale Shipping Co.*, 512 U.S. ——, 129 L.Ed.2d 78, 87 (1994). The shipowner's duty is only to provide a workplace where an expert stevedore can work safely. There is no duty to provide a ship which is defect-free. If the particular hazard, such

as oil on the weather deck of a cargo ship, is so common that a stevedore anticipates its presence and is in fact actually inspecting the deck specifically for oil at the time of the accident, then logic and experience dictate the conclusion that the stevedore, particularly a superintendent-stevedore with over fifteen years experience as in this case, can safely work around the oil.

Petitioners admit that oil is a common hazard often found on the weather deck and that petitioner stevedore superintendent anticipated finding and was inspecting the deck for oil at the time of the accident. In light of these undisputed facts, which are the material facts relating to the shipowner's turnover duty of safe condition, it follows as a matter of law that the oil did not constitute a breach of the shipowner's duty. The vessel owner should be able to rely on an experienced stevedore superintendent to work around a hazard which he anticipates and for which he is actually inspecting. Here petitioner was looking specifically for the very condition which allegedly caused his accident. Because petitioners cannot make a showing that the shipowner breached its *Burnside—Howlett* turnover duty of safe condition, which is an essential element of their case, the District Court was correct in granting summary judgment.

In this case petitioners have presented no evidence and do not even contend that the shipowner had actual or constructive knowledge of the oil on the deck. There is no evidence as to when the oil spilled onto the deck or how long it had been there prior to the accident. In effect petitioners are asking the court to find liability without fault. This constitutes an unseaworthiness argument. Such basis of liability was abolished by the 1972 Amendments to the Longshore Act, 33 U.S.C. § 905(b).

The District Court's ruling in this case and on these admitted facts that the shipowner had no duty to warn petitioner superintendent-stevedore of the oil on the deck is consistent with *Burnside—Scindia—Howlett* principles.

The shipowner has no duty to warn of a hazard which is routinely encountered and reasonably to be anticipated by an expert and experienced stevedore in conducting his work. *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 417 n.18 (1969). Petitioners do not even contend that the presence of oil is not usually encountered or reasonably to be anticipated by an expert stevedore. They can hardly do so in light of their admissions that oil is commonly found on the whether deck of a cargo ship and that Stevedore Superintendent Wilson not only anticipated finding oil but was specifically inspecting the deck for oil at the time of the accident. Given these admisisons, the District Court's holding and the Eleventh Circuit affirmance are consistent with *Burnside*, *Scindia*, and *Howlett*. Moreover, the commonly encountered and anticipated oil hazard in this case was not "latent" within the principles of *Howlett* which defines such a hazard as one not anticipated by a competent stevedore in the ordinary course of cargo operations. 512 U.S. at ——, 129 L.Ed.2d at 88, 92.

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT SUITABLE FOR SUPREME COURT REVIEW. PETITIONERS' QUESTION PRESENTED FOR REVIEW IN EFFECT IS SIMPLY WHETHER THE DISTRICT COURT WAS CORRECT IN HOLDING THERE WAS NO GENUINE ISSUE OF MATERIAL FACT. THIS ISSUE DOES NOT JUSTIFY A WRIT OF CERTIORARI UNDER SUPREME COURT RULE 10.

This case is not suitable for U.S. Supreme Court review. In effect petitioners are contending that the District Court committed error by granting summary judgment when there are issues of material fact to be decided by a jury. This is evident from petitioners' presentation of their questions for review wherein they state the Eleventh Circuit erred by removing the *Scindia* duties from the jury. Additionally, throughout their brief petitioners emphasize

that the "trier of fact" should have been allowed to decide the case. Whether the District Court was correct in holding there was no genuine factual issue for trial is not an issue recognized by Supreme Court Rule 10 as justifying the granting of a writ of certiorari. Moreover the case does not involve any unsettled principles of federal law or any issues of great public significance. In addition the lower court's decision is not in conflict with the decisions of this court or any circuit court.

II. WHERE IT IS UNDISPUTED THAT OIL IS COMMONLY FOUND ON A SHIP'S DECK AND AN EXPERIENCED STEVEDORE-SUPERVISOR NOT ONLY ANTICIPATES FINDING OIL BUT IS ACTUALLY INSPECTING THE DECK SPECIFICALLY FOR OIL, THE DISTRICT COURT'S HOLDING THAT ON THESE SPECIFIC FACTS THE OIL DID NOT CONSTITUTE A BREACH OF THE SHIPOWNER'S TURNOVER DUTY IS CONSISTENT WITH THIS COURT'S DECISIONS IN THE *BURNSIDE, SCINDIA,* AND *HOWLETT* CASES.

In *Howlett v. Birkdale Shipping Co.*, 512 U.S. ——, 129 L.Ed.2d 78 (1994), this Court relied on its previous decision in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969) in defining the shipowner's turnover duty of safe condition as requiring the vessel owner to exercise ordinary care to turn over the ship to the stevedore in such condition that an expert and experienced stevedore "mindful of the dangers he should expect to encounter, arising from the hazards of the ship's service" can conduct cargo operations safely. 512 U.S. at ——, 129 L.Ed.2d at 87, quoting from *Federal Marine Terminals*, 394 U.S. at 416-17 n.18. If an experienced stevedore is mindful of, or anticipates, the particular hazard, then the hazard does not constitute a breach of the shipowner's turnover duty. There is no duty to provide a vessel which is "defect free", *Bilderbeck v. World Wide Shipping Agency*, 776 F.2d 817, 818 (9th Cir. 1985), only a duty to turn over the ship in such condition that

an experienced stevedore mindful of the hazards he should expect to encounter can work safely. *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 167 (1981).

Petitioner in this case, a stevedore superintendent with over fifteen years experience, admitted in his pleadings that oil on the weather deck of a cargo ship is to be anticipated and that he was actually looking for and inspecting specifically for oil on the deck at the time of the accident. If an experienced stevedore not only anticipates finding oil on the deck but is inspecting the deck specifically for oil at the time of the accident, logic and experience dictate that he can safely work around the oil, whether the oil is open and obvious or difficult to see. Here the stevedore superintendent was looking for and inspecting specifically for the very condition that allegedly caused his accident. In light of these undisputed facts, which are the material facts relating to the shipowner's turnover duty of safe condition, it follows that the oil did not constitute a breach of the shipowner's turnover duty of safe condition. Because of these admissions, petitioners cannot make a showing that the shipowner breached its *Howlett* turnover duty, which is an essential element of their case on which they will bear the burden of proof at trial, and the District Court was correct in granting summary judgment. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). Moreover the District Court decision and the Eleventh Circuit affirmance are entirely consistent with the principles of *Federal Marine Terminals* and *Howlett*.

Although the District Court did not specifically address the turnover duty of safe condition, this is of no consequence because the material facts relating to this duty have been admitted by petitioners in their pleadings. Reviewing *de novo*, all the Eleventh Circuit was required to do was to apply the *Howlett* principles to the admitted facts. Based on petitioners' admissions, the shipowner, as a matter of law, satisfied its *Howlett* turnover duty of safe condition and summary judgment was proper.

Contrary to petitioners' assertion, the lower court's decision does not eliminate a stevedore's remedy for obscured oil on a ship's deck or introduce the doctrine of assumption of risk. The District Court held simply that because this particular supervisory stevedore admittedly anticipated and was actually inspecting for the very condition which allegedly caused his accident, the condition did not violate the shipowner's turnover duty. What sets this case apart are petitioners' admissions. The holding sets no general precedent that longshore and harbor workers can under no circumstances recover for oil on a ship's deck. Moreover, the shipowner's satisfaction of its turnover duty is based on the undisputed facts in this particular case that oil would be anticipated by a reasonably competent stevedore and that the stevedore superintendent was inspecting for oil. It is not based on an assumption of risk by the petitioner.

III. WHERE THERE IS NO EVIDENCE AND NO CONTENTION THAT THE SHIPOWNER HAD ACTUAL OR CONSTRUCTIVE PRIOR KNOWLEDGE OF THE PRESENCE OF OIL ON DECK, TO HOLD THE SHIPOWNER RESPONSIBLE WOULD CONSTITUTE LIABILITY WITHOUT FAULT.

Under the principles of the *Burnside*, *Scindia*, and *Howlett* cases, the shipowner's turnover duty of safe condition is one of "ordinary care under the circumstances". *Burnside*, 394 U.S. at 416 n.18 (1969); *Scindia*, 451 U.S. at 167 (1981); *Howlett*, 512 U.S. at ——, 129 L.Ed.2d at 87 (1994). In order to recover for a shipboard hazard, a longshore or harbor worker must show not only that the hazard would have been neither obvious to nor anticipated by a reasonably competent worker, he must also show that the shipowner had actual or constructive prior knowledge of the hazard. *Howlett v. Birkdale Shipping Co.*, 512 U.S. ——, 129 L.Ed.2d 78, 92 (1994). In this case petitioners have presented no facts showing that respondent shipowner had actual or constructive prior knowledge of the oil on the deck. Nor

do they even contend the shipowner had such knowledge. There is no evidence as to when the oil spilled onto the deck or how long it had been there before the accident. Without evidence on this point, petitioners are asking the court to find liability without fault, which was expressly abolished by the 1972 Amendments to the Longshore Act, 33 U.S.C. § 905(b). In effect, petitioners are making an unseaworthiness argument. However negligence, not unseaworthiness, is the controlling standard. *Howlett*, 512 U.S. at ——, 129 L.Ed.2d at 91 (1994).

In their brief, petitioners contend that the lower court's decision is inconsistent with the congressional intent of the 1972 LHWCA Amendments as set forth in the legislative history. The committee report to which petitioners refer, which pre-dated the *Scindia* and *Howlett* decisions, states that where a longshoreman slips on oil on a ship's deck, in order to recover he must establish that the shipowner put the oil on the deck or knew it was there and negligently failed to remove it, or establish that the oil had been on the deck for a sufficient period of time for the shipowner to have discovered and removed the oil. H.R. Rep. No. 92-1441, 92nd Cong., 2d Sess. 10-11, reprinted in 1972 U.S.C.C.A.N. 4698, 4704.

The decision of the District Court and the Eleventh Circuit affirmance are not in conflict with the expressed congressional intent. In this case there is no contention that the shipowner "put" the oil on the deck in the sense of an intentional act or that the shipowner knew that it was there at anytime prior to the accident. Petitioners simply allege that the oil came from a crane house on the ship. They do not contend that the shipowner had prior knowledge of the oil on the deck. Although petitioners claim that vessel crewmembers had been seen on deck prior to the accident, mere presence of a vessel's crew on the ship does not prove knowledge of a hazardous condition. *Casaceli v. Martech International, Inc.*, 774 F.2d 1322, 1330 (5th Cir. 1985), cert. denied 475 U.S. 1108-09 (1986). Because there is no evidence as to when the

oil spilled onto the deck or how long it had been there prior to the accident, there is no basis upon which the shipowner can be charged with constructive knowledge of the presence of the oil.

Throughout their brief petitioners describe the oil as "undetectable". If the hazard was undetectable to an experienced stevedore superintendent and a stevedore safety director, it was equally undetectable to the ship's crew in the exercise of "ordinary care under the circumstances". *Howlett v. Birkdale Shipping Co.*, 512 U.S. ——, 129 L.Ed.2d 78, 87 (1994) quoting from *Federal Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404, 416 n.18 (1969).

Merely because the oil allegedly came from the ship's crane housing is not sufficient to raise a factual issue as to satisfaction of the shipowner's turnover duty. If a shipowner could be held liable solely because a hazard allegedly involved vessel equipment, such a rule would lead to a shipowner's liability without fault which has been expressly abolished by Congress.

IV. WHERE IT IS UNDISPUTED THAT OIL ON A SHIP'S DECK IS ROUTINELY ENCOUNTERED AND REASONABLY TO BE EXPECTED BY AN EXPERT STEVEDORE AND AN EXPERIENCED STEVEDORE-SUPERVISOR IS ACTUALLY INSPECTING THE DECK SPECIFICALLY FOR OIL, THEN THE DISTRICT COURT'S HOLDING THAT ON THESE SPECIFIC FACTS THE SHIPOWNER HAD NO DUTY TO WARN THE STEVEDORE OF THE OIL IS CONSISTENT WITH THE *BURNSIDE, SCINDIA,* AND *HOWLETT* CASES.

Under the Supreme Court cases defining a shipowner's turnover duty to warn, *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404 (1969), *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), and *Howlett v. Birkdale Shipping Co.*, 512 U.S. ——, 129 L.Ed.2d 78 (1994), a shipowner has no duty

to warn of a hazard which would be anticipated by an experienced stevedore in the ordinary course of cargo operations. The language from *Burnside* is that the shipowner has a duty to warn of "any latent or hidden danger which has not been remedied and is *not usually encountered or reasonably to be expected by an expert and experienced stevedoring company* in the performance of the stevedoring work aboard the ship". *Federal Marine Terminals,* 394 U.S. at 417 n.18, quoting from *Hugev v. Dampskisaktieselskabet International,* 170 F.Supp. 601, 611, aff'd *sub nom Metropolitan Stevedore Co. v. Dampskisaktieselskabet International,* 274 F.2d 875, cert. denied, 363 U.S. 803 (1960) (emphasis supplied). If the stevedore expects or anticipates the hazard, there is no duty to warn of it.

As previously discussed, the petitioner stevedore superintendent admits in his pleadings that an experienced stevedore would anticipate oil on the weather deck of a cargo ship and that he was inspecting the deck specifically for oil at the time of the accident. In light of these admissions, the lower court's holding that the shipowner had no duty to warn the superintendent of a hazard he anticipated and was looking for is consistent with Supreme Court authority.

Although the oil hazard in this case was allegedly obscured, it is illogical for petitioners to admit that oil on the deck is so common that an experienced stevedore would anticipate its presence and at the same time contend that an experienced stevedore would not anticipate that some patches of oil on the deck are easier to see than others. Moreover the oil in this case was not "latent" as defined in the *Burnside* and *Howlett* cases. Under these authorities, a latent defect is one not usually encountered or reasonably to be expected by an experienced stevedore. *Federal Marine Terminals,* 394 U.S. at 417 n.18; *Howlett v. Birkdale Shipping Co.,* 512 U.S. at ——, 129 L.Ed.2d

at 88, 92. Since it is undisputed in this case that oil on the weather deck is routinely encountered and is to be anticipated by an experienced stevedore, the oil hazard was not latent as defined in *Burnside* and *Howlett* and the District Court decision is consistent with Supreme Court authority. Moreover petitioners make no contention that obscured oil on the deck of a cargo ship is anything unusual or would not be anticipated by an experienced stevedore. Because petitioners cannot make a showing that the shipowner had a duty to warn, an essential element of their case, summary judgment on this issue was mandated. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986).

Although petitioners contend that the District Court decision conflicts with two Fifth Circuit cases, *Treadaway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161 (5th Cir. 1990) and *Gay v. Barge 266*, 915 F.2d 1007 (5th Cir. 1990), these opinions have no application to the uncontested facts in the case before this court. The two cited cases involve hazards which the maritime workers had no practical choice but to encounter in order to do their work. The basis for the rulings is that where the hazard is unavoidable such that the worker has no practical alternative to subjecting himself to the hazard notwithstanding its obviousness or the fact that the danger is anticipated by him, the shipowner has potential liability. This rule was recognized in *Kirsch v. Plovidba*, 971 F.2d 1026 (3d Cir. 1992), another case cited by petitioners, where the Third Circuit upheld a summary judgment for the defendant shipowner on the basis that the vessel owner is liable for injury caused by an obvious hazard only if the longshoreman worker could not avoid the hazard and work safely.

In contrast to the situation in the *Treadaway* and *Gay* cases, there is no evidence or even a contention that the petitioner stevedore superintendent had no practical alternative but to step in the oil or that the oil was otherwise unavoidable. Based on the area as shown in the photo-

graphs in petitioners' brief, it would have been a simple matter for the superintendent to have stepped around the oil had he been attentive. Therefore the cited decisions have no application to the admitted facts of this case.

Petitioners also contend that the District Court decision conflicts with the Ninth Circuit's opinion in *Thomas v. Newton International Enterprises*, 42 F.3d 1266 (9th Cir. 1994). In *Thomas* the court held that the opinion of an expert, which was excluded by the trial court, raised a material issue of fact as to whether the presence of an unguarded hatch opening on a vessel represented an unreasonably dangerous condition. Petitioners have offered no such opinion in this case. The Ninth Circuit held that although the plaintiff could have avoided falling into the open hatch cover by stepping in a different direction, this did not relieve the shipowner of liability where the hazard was *not* one that an experienced longshore worker, mindful of the dangers he should reasonably expect to encounter, would anticipate. *Thomas*, 42 F.3d at 1272. In contrast, it is undisputed in the present case that an experienced stevedore would anticipate finding oil on the deck and that petitioner superintendent was inspecting the deck specifically for oil at the time of the accident.

CONCLUSION

The District Court decision and the Eleventh Circuit affirmance do not depart from *Burnside*, *Scindia*, or *Howlett* in any respect. Presented with a factual situation where a stevedore-supervisor anticipated and was inspecting specifically for the very hazard he claims caused his injury, the District Court and the Eleventh Circuit looked to *Scindia's* guidance concerning a shipowner's nonliability for hazards anticipated by the stevedore and applied it to petitioners. This ruling is consistent with the holding of *Scindia* on that subject and does not provide a basis under Supreme Court Rule 10 for granting a

writ of certiorari. It is respectfully submitted that the petition should be denied.

Respectfully submitted,

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Counsel for Respondent

APPENDIX

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No. CV493-36

JAMES T. WILSON and ELAINE WILSON,
Plaintiffs,

vs.

ALEXANDER'S POWER SHIPPING CO., LTD.,
Defendant.

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS NO GENUINE ISSUE TO BE TRIED

NOW COMES the defendant Alexander's Power Shipping Co., Ltd. and submits the following statement of material facts in support of its motion for summary judgment:

1) On April 17, 1991 the Motor Vessel ALEXANDER'S POWER was calling at Savannah for the purpose of loading lumber. Allsouth Stevedoring Company of Savannah, an independent stevedoring contractor, was in charge of the loading operation. (Complaint, paragraph 6; affidavit of Jon W. Latiolais, paragraph 3)

2) Plaintiff James T. Wilson was at all pertinent times an experienced stevedore superintendent for Allsouth Stevedoring Company (Complaint, paragraph 63 and was supervisor of Allsouth's loading operation.

3) At the time of the alleged accident, plaintiff was on the ship's weather deck proceeding toward the number 2 hold. (Complaint, paragraph 7).

4) Plaintiff contends that he slipped on an oil slick located on the weather deck and fell on his back, sustaining injury. (Complaint, paragraph 7)

5) Plaintiff's accident occurred at approximately 7:50 a.m. and it was broad daylight at the time.

6) The oil slick on which plaintiff contends he slipped was out in the open on the weather deck and there was nothing obstructing it from view. (affidavit of Jon W. Latiolais, paragraph 6).

7) The oil slick covered an area on the deck approximately two feet wide and two feet long. (affidavit of Jon W. Latiolais, paragraph 5)

8) There was sufficient space on the deck around the oil slick so that someone walking on the deck could avoid stepping in the oil. (affidavit of Jon W. Latiolais, paragraph 8)

9) The oil was shiny and distinct in appearance from the deck area underlying and surrounding it. (affidavit of Jon W. Latiolais, paragraph 6)

10) The color of the oil was reddish brown. (affidavit of Jon W. Latiolais, paragraph 6)

11) Oil and grease are common safety hazards found on the weather deck of a merchant vessel. (affidavit of Robert C. Stone, paragraphs 4 and 6; affidavit of Harry E. Jennings, paragraph 2)

12) Sources of oil and grease found on the weather deck of a merchant vessel include the ship's cranes and winches, mechanical hatch covers, cargo wires and cables, hydraulic lines, deck cargo consisting of motorized vehicles and equipment, and drum cargo. (affidavit of Robert C. Stone, paragraph 4; affidavit of Harry E. Jennings, paragraph 3)

13) An experienced stevedore superintendent reasonably competent in the performance of his work should

watch for safety hazards on the weather deck of a merchant vessel which could present a danger to the stevedore's longshoremen employees in the performance of their work on the vessel. (affidavit of Robert C. Stone, paragraph 3; affidavit of Harry E. Jennings, paragraph 4)

14) An experienced stevedore superintendent reasonably competent in his work should anticipate, watch for, and avoid oil and grease on the weather deck of a merchant vessel. (affidavit of Robert C. Stone, paragraphs 4 and 6; affidavit of Harry E. Jennings, paragraph 4)

15) One of the responsibilities of a stevedore is to comply with the Federal Safety and Health Regulations for the Longshoring Industry. (29 C.F.R. § 1918 *et. seq.*)

16) Section 1918.91 (c) of the Federal Safety and Health Regulations for Longshoring requires a stevedoring company to eliminate slippery conditions as they occur.

17) Section 1918.38 of the Federal Safety and Health Regulations for Longshoring provides that in instances where a ship's deck is wet with oil, the stevedore employer shall not permit longshoring employees to work until necessary walking and working areas have been made safe by suitable non-skid materials.

18) In order to comply with the regulations referred to in paragraphs 16 and 17 hereof, hte stevedore normally inspects the ship's weather deck for oil and grease which could present a hazard to the longshoremen employees in their work and makes sure that slippery conditions are eliminated before the longshoremen start work on the ship. (affidavit of Robert C. Stone, paragraph 5)

19) In order to comply with the regulations referred to in paragraphs 16 and 17 hereof, an experienced stevedore reasonably competent in his work must anticipate and watch specifically for the presence of oil and grease on the weather deck of a merchant vessel. (affidavit of Robert C. Stone, paragraph 5)

This 29th day of April, 1993.

CHAMLEE, DUBUS & SIPPLE

By: /s/ David F. Sipple
DAVID F. SIPPLE
Georgia State Bar
Number 649200

P.O. Box 9523
Savannah, Georgia 31412
(912) 232-3311

Attorneys for Defendant
Alexander's Power Shipping
Co., Ltd.

CERTIFICATE OF SERVICE

This is to certify that a copy of the forgoing pleading was served on counsel of record by placing a copy of same in the United States Mail with adequate postage and addressed as follows:

Edwin D. Robb, Jr., Esquire
Bouhan, Williams & Levy
P.O. Box 2139
Savannah, Georgia 31498-1001

This 29th day of April, 1993.

/s/ David F. Sipple
DAVID F. SIPPLE
Of Counsel for Defendant
Alexander's Power Shipping
Co., Ltd.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

Civil Action No. CV 493-36

JAMES T. WILSON and ELAINE WILSON,
Plaintiffs,

vs.

ALEXANDER'S POWER SHIPPING CO., LTD.,
Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE EXISTS NO GENUINE ISSUE TO BE TRIED

COMES NOW the Plaintiffs in the above-captioned matter and respond to the Defendant's Statement of Material Facts as to Which There Exists No Genuine Issue to be Tried as follows:

1. The Plaintiffs admit paragraph one but aver that at the time of the incident loading operation had not commenced.

2. The Plaintiffs admit paragraph two but aver that at the time the incident occurred the loading operation had not commenced.

3. The Plaintiffs admit paragraph three.

4. The Plaintiffs admit paragraph four.

5. The Plaintiffs admit paragraph five.

6. The Plaintiffs deny paragraph six.

7. The Plaintiffs deny paragraph seven. As set forth in Donald Klages' affidavit, he could not detect the pres-

ence of any oil until after Plaintiff fell. He detected oil only by rubbing his hand across the area where Plaintiff fell. He can state that, after oil was detected, it seemed to run in a stream from the house and its dimensions were not 2 ft. x 2 ft. Prior to the Plaintiff's fall, neither Plaintiff, Mr. Hughes and/or Mr. Klages detected any oil.

8. The Plaintiffs deny paragraph eight.

9. The Plaintiffs deny paragraph nine.

10. The Plaintiffs deny paragraph ten.

11. The Plaintiffs admit paragraph eleven but aver that the oil was transparent, mingled with the dew on the deck and therefore constituted a hidden hazard.

12. The Plaintiffs admit paragraph twelve but avers that the oil constituted a hidden hazard that was not detected by two Allsouth stevedores and the Allsouth Safety Director.

13. The Plaintiffs admit that Plaintiff and his co-stevedore Mr. Hughes were looking for oil as well as Allsouth's Safety Director. Neither one detected the presence of the transparent oil.

14. The Plaintiffs admit that a stevedore superintendent should watch out for oil but aver that the oil in question constituted a hidden hazard. Moreover, even had it not been a hidden hazard, it would have been difficult to avoid under the circumstances in which Plaintiff was required to walk on previously stowed lumber down to the deck in order to proceed on the starboard weather deck.

15. The Plaintiffs admit paragraph fifteen but deny that Plaintiff violated any of these regulations.

16. The Plaintiffs admit paragraph sixteen but deny the relevancy to the incident occurring prior to turnover.

17. The Plaintiffs admit paragraph seventeen but questions whether this section is relevant prior to turnover.

18. The Plaintiffs admit paragraph eighteen but deny that this oil could have been detected and that it constituted a hidden hazard. Moreover, even if it had not constituted a hidden hazard, under the circumstances it would not have been easily detected.

19. The Plaintiffs admit paragraph nineteen but aver that Plaintiff and his co-workers looked for presence of oil but could not detect it in view of the fact that it constituted a hidden hazard. Moreover, because he was required to walk on lumber and step down onto the deck in order to proceed on the weather deck even an open condition would have been difficult to detect and, thus, difficult to avoid under the circumstances.

This the 24th day of May, 1993.

BOUHAN, WILLIAMS & LEVY

By: /s/ Edwin D. Robb, Jr.
EDWIN D. ROBB, JR.
Georgia State Bar # 33490
Attorney for Plaintiffs

Post Office Box 2139
Savannah, GA 31498-1001
(912) 236-2491

CERTIFICATE OF SERVICE

I Edwin D. Robb, Jr., do hereby certify that I have this day served the foregoing Plaintiff's Response to Defendant's Statement of Material Facts as to Which There Exists No Genuine Issue to be Tried by placing a copy of the same in the United States mail, with proper postage affixed to assure delivery, to counsel of record as follows:

David Sipple, Esq.
Chamlee, Dubus & Sipple
P.O. Box 9523
Savannah, Georgia 31412

This the 24th day of May, 1993.

BOUHAN, WILLIAMS & LEVY

By: /s/ Edwin D. Robb, Jr.
EDWIN D. ROBB, JR.
Georgia State Bar # 33490
Attorney for Plaintiffs

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